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THE INITIATIVE AND REFERENDUM AS VIOLATING THE CONSTITUTIONAL PROVISION GUARANTEEING A REPUBLICAN FORM OF GOVERNMENT.

We desire to call the attention of the profession to the articleof Hon. Thomas A. Sherwood in this issue on the Initiative and Referendum Under the Federal Constitution. Judge Sherwood, who for over thirty years was a member of the Supreme Bench of Missouri, is universally recognized as having been the most competent jurist that ever sat in that tribunal, especially on questions of criminal and constitutional law. His independence of thought, his clearness of reasoning and the eloquent and forceful expressions with which he clothed his arguments, has given him a place among the greatest of our state judges.

The question discussed by Justice Sherwood in this issue, while not yet hardly out of the realm of academic discussion, is approaching dangerously near the line where it will soon be a question for judicial construction. In Oregon the system has just been inaugurated. In Missouri and several other states, constitutional amendments embodying this new idea are in various stages of adoption. Is this system contrary to the provision of the Constitution guaranteeing to every state a republican form of government? We confess the suggestion startled us, but the argument of Justice Sherwood offers opportunity for careful thought and meditation on this question.

WHAT IS A RESTRAINT OR MONOPOLY OF INTERSTATE COMMERCE?

The celebrated case of the United States against the Northern Securities Company was argued on appeal at St. Louis last week before Justices Caldwell, Thayer, Sanborn and Vandeventer of the Circuit Court of Appeals for the eighth circuit. The argument consumed three days and was replete with learning and sharp repartee, together with occasional flashes of wit and humor.

To understand fully the importance and nature of this suit we should have a clear idea of the particular question involved. The suit was instituted under what is commonly known as the Sherman anti-trust act. This act, however, does not prohibit trusts and monopolies in general, Congress under its enumerated powers having no authority to enact such legislation. The act was passed under the power granted to Congress to regulate commerce, and, as former Attorney-General Griggs said in his argument in behalf of the Securities Company, "the act cannot be extended beyond the limits of this power." The act therefore is directed against only two kinds of combinations,—first, those which attempt to restrain interstate commerce, and, second, those which attempt to monopolize any part of interstate commerce. These are two distinct things and a failure to differentiate between them will confuse the student of the questions involved in the important litigation which we have under consideration.

Probably it would be well to set out in full the two provisions of the Sherman Act on which the Securities Case is founded. The first section of the act is as follows: "Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states, or with foreign nations is hereby declared to be illegal." The second section provides: "Every person who shall monopolize, or attempt to monopolize, or combine, or conspire with any other person or persons to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor." Upon these two provisions of the act the government bases its right of action, making, in its petition, the following charges against the defendants: "A virtual consolidation under one ownership and source of control of the Great Northern and Northern Pacific Railway systems has been effected, a combination or conspiracy in restraint of the trade or commerce among the several states and with foreign nations formerly carried on by the defendant railway companies independently and in free competition one with the other has been formed and is in operation, and the defendants are thereby attempting to monopolize and have monopolized, such interstate and foreign trade or commerce to the great and irreparable damage of the people of the United States, in derogation of their common

rights, and in violation of the act of Congress of July 2, 1890, entitled 'An act to protect trade and commerce against unlawful restraints and monopolies.'"

Whether the Northern Securities Company is a "combination or conspiracy in restraint of trade or commerce among the several states," is, in our opinion, not a doubtful question in view of the authorities. Under the decisions of the United States Supreme Court, the restraint of interstate commerce must be a direct restraint, as, for instance, in the case of United States v. Joint Traffic Association (1898), 171 U. S. 568, where the court held that where several interstate railroads come together and agree to maintain certain rates of transportation, this is a "direct restraint" within the meaning of the Sherman Act. But in this case the court set a limit to operation of this section of the act in the following words: "The Act of Congress must have a reasonable construction, or else there would scarcely be an agreement or contract among business men that could not be said to have directly or remotely some bearing upon interstate commerce." In the case of the Northern Securities Company we have merely the incorporation of a company by the state of New Jersey, empowered by its charter to buy and sell stock of any kind for purposes of investment. This, so far, is all that has been done or attempted to be done. There has been no attempt to fix rates of transportation, or otherwise to interfere with interstate commerce. The agent of the company went into the market and purchased shares of the Northern Pacific and Great Northern stock until they secured a majority of the stock of each. The company has done nothing but vote its stock and elect the directorates in each company in which they hold the majority of stock. There is no evidence of any attempt between the two roads themselves, which are still run independently, to come together and in any way restrain commerce, as by fixing the rates of transportation, and therefore, there can be said to be no direct restraint of interstate commerce. There was in each of the three cases in which this section has already been construed, an agreement dealing specifically with rates and prices affecting interstate commerce. United States v. Joint Traffic Association, 171 U. S. 577; Addyston Co. v. United States, 175 U. S. 229; United States v. Trans-Missouri Freight Associations, 166 U. S. 313. There is no such agreement in the present case, or anything like it. The relation of the acts of these individuals to interstate commerce is comparatively remote and circuitious.

Whether, however, the Northern Securities Company falls within the purview of the second section of this act as being "a combination or conspiracy to monopolize *any part* of interstate commerce," we believe to be a more doubtful question. Our individual opinion is that the government's contention under this section is well founded.

In the first place it is very evident that a "combination or conspiracy to monopolize any part of interstate commerce" is a more sweeping and inclusive declaration than a conspiracy to restrain commerce. "The federal government," says the Hon. Carman F. Randolph, in speaking of this case in the *Columbia Law Review*, "would not have interposed had the Northern Securities Company acquired stocks to any amount in any number of corporations not engaged in interstate commerce. In fact it acquired stocks in interstate railways. Still the government would not have interposed had it acquired minority interests in competing lines, or majority interests in connecting or unrelated lines. Such operations would have been viewed with indifference, as the acts of a company whose investments were not of federal concern. But the company acquired majority interests in the Great Northern and Northern Pacific Railways which, as we shall see, are in a position to compete for a part of interstate traffic, and this transaction has provoked the present suit." The question, therefore, is, does the fact that an individual or corporation obtains the majority interest in two competing railroad corporations having to do with interstate commerce, render such person or corporation amenable to the provisions of the second section of the Sherman Anti-Trust Act? We are firmly convinced that it does.

To say that one person or corporation cannot buy the majority interest in two interstate railroads sounds unusual and unreasonable, especially in view of the fact that this and other things, even more closely approximating a monopoly, have been practiced extensively and with increasing frequency

during the last ten years. And so, Hon. John W. Griggs, speaking for the defendants, made the astounding proposition to the court orally as well as in his brief that the "acquiesience by the government for more than eleven years in the actual merger and consolidation of many important parallel and competing lines of railroads and steamships engaged in interstate and international commerce, has given a practical construction to the act of July 2, 1890, to the effect that it was not intended to forbid, and does not forbid, the natural processes of unification which are brought about under modern methods of lease, consolidation, merger, community of interest, or ownership of stock." If that statement is true the Sherman anti-trust act is an absolute nullity and no power whatever exists in the federal government to curb the influence of monopolizing tendencies in interstate commerce.

It is very evident that the vital and decisive question in this important case hinges on a proper and exact definition of the word monopolize. The old Blackstone definition of monopoly as an "exclusive license or privilege allowed by the king" is not sufficient. In fact its application to the second section of the Sherman act would be absolutely meaningless. We regard Webster's definition as more satisfactory: "Monopolize" says Webster, "is the act of purchasing or obtaining possession of the whole of anything, with a view to appropriate or control the exclusive sale thereof." We believe only one change is necessary to make this an absolutely correct legal definition of the term, especially as used in this act, and that is the insertion of the word "power" in place of the word "view." This change would only be following the repeated decisions of the Supreme Court that as regards the provisions of the Sherman Anti-Trust Act, the intent with which the defendants formed the alleged combination or conspiracy, is immaterial, as the court will look only on the result of their agreements, and if this gives them the power to do what the Act prohibits it will avail the defendants nothing to say that they did not intend to use the power thus obtained by them. Under the definition, therefore, as thus modified, the Northern Securities Company is clearly a combination to monopolize a part of interstate commerce. The two greatest and sole competing railroad lines engaged in interstate traffic in the entire northwest have by a shrewd scheme been put under the absolute control of a few men who, under the guise of a New Jersey corporation, have pooled their interests and practically merged these two competing systems under one management. and, as stated in the learned argument of counsel for the government, the Northern Securities Company has acquired not only a majority of the capital stock of the Northern Pacific and Great Northern railroads but also, with them, by previous acquisition the control of the Burlington and Union Pacific roads, involving securities aggregating it is alleged $3,700,000,000. If an individual or corporation has, by these immense holdings (and it undoubtedly has) the power to control interstate commerce in the northwest or of any other part of the country then it undoubtedly comes within the prohibition of the second section of the Sherman Act. But, some one will say, have not two competing interstate railroad lines, or other instruments of interstate commerce, the right to merge or consolidate? We can see nothing on which such agreements are justified in view of section 2 of the Sherman Act. And the fact that these agreements have been common and the nullification of them at this late day may have a most disastrous effect on business, while quite an effective argument on the side of expediency, is not one to be addressed to the ear of a court of justice. Indeed, it not infrequently happens that under some conscientious public official, many an old statute is unearthed and enforced to the consternation and undoing of many violators of the law who thought themselves secure by reason of its negligent enforcement under previous administrations. We do not believe that this contention, which, both in oral and written argument, has been pressed so earnestly upon the court, should have any influence in turning away the court from its evident duty to give life and vitality to a statute, which, while existing for the protection of the whole people, has been permitted to sleep while hungry cormorants have preyed upon the very life-blood of the country's commerce, until excited by their desire for more blood, they are ready to grapple at the throat of the government itself and defy its power to do anything to effectively protect itself.

NOTES OF IMPORTANT DECISIONS.

FORMER JEOPARDY — CONVICTION OF BATTERY AS BAR TO PROSECUTION FOR ASSAULT TO COMMIT MURDER.—Is the conviction of a battery a bar to prosecution for assault with intent to commit murder? The recent case of People v. McDaniels (Cal.), 69 Pac. Rep. 1006, answers the question propounded in the affirmative. The court said: "All criminal prosecutions are by the state, which is a single entity. It may choose its forum, and determine for what particular offense it will prosecute the citizen for a violation of the criminal law. It cannot complain if it has made an unwise selection, but, having made its selection and inflicted the penalty it has imposed for such violation, the constitution interposes for the protection of the accused, and declares that he shall not be twice put in jeopardy for the same offense."

"The rule of interpretation thus announced is in many of the cases," says Mr. Bishop, "not thought of by the courts, and other obvious principles are overlooked, so that our books contain numerous decisions wherein this constitutional right has been denied to the prisoner." Bish. New Cr. Law, Sec. 1070. That there are numerous decisions in other jurisdictions inconsistent and even contradictory to this decision may be admitted. A recent example is that of State v. Cady (S. Dak.), 87 N. W. Rep. 927, where it was held that: "An acquittal on trial under Comp. Laws, Sec. 6491, charging an assault on a certain person with a deadly weapon with intent to rob, is not a bar to a conviction under section 6481, on an indictment charging robbery in taking money from such person, against his will, by force." The transaction was the same. In that state, as here, they have a statute permitting a conviction of any lesser offense necessarily included in that charged in the indictment. See, also, Morey v. Commonwealth, 108 Mass. 433. The rule laid down by the California court, however, is sustained by the weight of authority. Moore v. State, 71 Ala. 307; Jackson v. State, 14 Ind. 327; State v. Chinault, 55 Kan. 326, 40 Pac. Rep. 662; Reg. v. Elmigton, 9 Cox, Cr. Cas. 86.

MUNICIPAL CORPORATIONS—RIGHT OF A CITY TO PROHIBIT THE ERECTION OF BILL-BOARDS.—The erection of bill-boards on vacant lots fronting on populous city thoroughfares for purposes of advertising has gone far past the point where it could be said to be a reasonable use of the thoroughfare, and has clearly arrived at that point where it has become a great and ever present nuisance. Every resident of any large city will testify as to the unsightly condition of the thoroughfare occasioned by the erection of unsightly board fences projected prominently upon the highway and covered with high-colored, flaring announcements or attempts at artistic effects, many of which are not even free from the charge of immorality overlooking for the moment other charges that might be brought against them. Recognizing these things, can we say that they are insufficient to justify a city to so far interfere with private right as to prohibit their erection? This question was answered negatively in the recent case of Whitmeir & Felbrick Co. v. City of Buffalo, 118 Fed. Rep. 772, where the United States Circuit Court for the Western District of New York held that under Buffalo city charter authorizing the common council to enact ordinances to prevent and abate nuisances, and for the good government of the city, etc., that city had power to pass an ordinance prohibiting the erection of bill-boards exceeding seven feet in height within the city, without the council's permission, and authorizing the abatement of any board erected in violation of the ordinance as a nuisance. The court said:

"The enactment prohibiting the erection of fences and bill-boards more than seven feet in height is not unreasonable, and the right of abatement as therein provided does not go beyond the extent of the police power as delegated by the supreme legislative authority of the state of New York to the city. *In re* Wilshire (C. C.), 103 Fed. Rep. 620; Griffin v. City of Gloversville, 67 App. Div. 403, 73 N. Y. Supp. 684. The abatement and removal is not taking private property for a public use, but must be construed as a salutary restraint on a noxious use by the owner, and within the police power of a city or municipality whose charter brings such ordinance within its legislative authority." This ordinance had already been sustained by the Supreme Court of New York in the recent case of City of Rochester v. West, 164 N. Y. 510, 58 N. E. Rep. 673, 53 L. R. A. 548, 79 Am. St. Rep. 659.

NEGLIGENCE—RIGHT OF ACTION FOR INJURY RESULTING FROM FRIGHT.—Does a cause of action lie for physical injury resulting from fright or nervousness caused by negligent acts? This was the question sent up by the trial court for determination by the Supreme Court of North Carolina in the recent case of Watkins v. Kaolin Manufacturing Co., 42 S. E. Rep. 982. The particular point decided by the court was that an action will lie for physical injury or disease resulting from fright or nervous shock, caused by the negligence of a defendant in blasting at a distance of 60 paces from plaintiff's house, throwing rocks on and through it, after being asked by her to direct the blasting so that it would not do this. The court answering the question we propounded at the beginning of this suit, said:

"As to the third question: We are of the opinion that an action will lie for physical injury or disease resulting from fright or nervous shocks caused by negligent acts. From common experience we know that serious consequences frequently follow violent nervous shocks caused by fright, often resulting in spells of sickness, and sometimes in sudden death. Whether the physical injury was the natural and proximate result of the fright or shock is a question to be determined by the jury upon the evidence showing the

conditions, circumstances, occurrences, etc. But it must also appear that the defendant could or should have known that such negligent acts would, with reasonable certainty, cause such result, or that the injury resulted from gross carelessness or recklessness, showing utter indifference to the consequences, when they should have been contemplated by the party doing such acts. As a condition precedent to recovery in such cases, it must appear that defendant must or ought to have known of plaintiff's perilous position or condition, against which he should have to exercise care, otherwise such injury could not be within the contemplation of the actor, and put him upon notice as to the special care. In the case at bar defendant company's servants acted with utter indifference to the plaintiff's safety, and knew that plaintiff was a woman, and that she and her little children lived and were in her house only 60 steps away, and exposed to the danger; and, after being asked by her to direct the blasting so as not to throw the rocks upon her house, continued to blast, throwing the stones from the size of a gallon bucket down to small stones upon and through her house and into her yard and garden (depositing as much as a wagon load of rocks in her yard and several wagon loads in her garden), making it necessary for her and her children to secret themselves in the basement behind a stack chimney, and even there they were in danger. From the fright and nervous shocks received from such blasting she testified that she was rendered almost helpless, and could not go about her daily duties, and could not keep on her feet to attend to her children, and has been affected ever since; that it has caused her female trouble out of its regular course. They, knowing that plaintiff was a woman, and knowing (or ought to know of), the weakness of a woman, should have contemplated the effects likely to be produced upon her by such danger and fright. We do not wish to be understood as holding that an action in a case like this would lie for mental suffering and anguish from which no physical injury or disease directly resulted, as that question is not squarely presented in this appeal."

The court then reviews the authorities: In Bell v. Railway Co., L. R. 26 Ir. 428,—the leading case in support of such action,—it is held that, if such bodily injury (serious impairment to health) might be a natural consequence of fright, it might be an element of damage for which a recovery might be had. Sedg. Dam. (8 Ed.) § 861, in commenting upon it, says: "The principle adopted in this case would seem to be the true one. The negligence of the company being admitted, any injury directly resulting should be compensated." In Pursell v. Railway Co., 48 Minn. 134, 50 N. W. Rep. 1034, 16 L. R. A. 203, the plaintiff, a pregnant woman, was frightened by the negligent conduct of defendant in running its cars, miscarried, and suffered permanent injury. Held, that a cause of action would lie. In Mack v. Railroad Co. (S. Car.), 29 S. E. Rep. 905, 40 L. R. A. 679, 68 Am. St. Rep. 913, the plaintiff threw himself down between and along the cross-ties just outside of the rail, bruising and injuring his person, and barely escaped being struck by the locomotive, and was terribly frightened and shocked, his mind was affected and partially destroyed, his reason unbalanced, and for a long time was made ill and sick, and suffered great mental anguish and physical pain arising from the terrible nervous shock and fright. Held, that an action would lie. Sloane v. Railway Co., 111 Cal. 668, 44 Pac. Rep. 320, 32 L. R. A. 193, is cited as an authority, but does not apply to the principal involved. There the recovery was had for mortification, nervous effects, and injuries suffered by reason of the plaintiff being put off the car by the conductor after having purchased a proper ticket, which was taken up by the conductor before reaching the station to change cars, and he failed to give her a check to be used on the connecting line. Those which hold *contra* are Haile's Curator v. Railroad Co., 9 C. C. A. 134, 60 Fed. Rep. 557, 23 L. R. A. 774, which holds that where a passenger on a railroad train receives no bodily injury from an accident caused by the company's negligence, but is made insane by the excitement and suffering resulting therefrom, the company is not liable in damages, since insanity is not a probable or ordinary result of exposure to railroad accidents. Ewing v. Railway Co., 147 Pa. 40, 23 Atl. Rep. 340, 14 L. R. A. 666, 30 Am. St. Rep. 709: By negligence of defendant's employees a car was derailed and thrown against plaintiff's house, subjecting her to fright and nervous excitement, permanently weakening and disabling her. Exhibits no cause of action. Mere fright, occasioned by accident, producing permanent injury to the nervous system, is a result too remote to be actionable. Mitchell v. Railway Co., 151 N. Y. 107, 45 N. E. Rep. 354, 34 L. R. A. 781, 56 Am. St. Rep. 604: Plaintiff was frightened by defendant's negligence in allowing its horses to nearly strike her, from the fright of which she miscarried. Held no action lies where there is no immediate personal injury. Victorian Railways Commissioners v. Coultas, 13 App. Cas. 222, held that damages for a nervous shock or mental injury, caused by fright at an impending negligent collision, are too remote. White v. Sander, 168 Mass. 298, 47 N. E. Rep. 90: Rock thrown through a window, and frightened a woman, who suffered greatly from nervousness. Held not to be actionable. Spade v. Railroad Co., 168 Mass. 285, 47 N. E. Rep. 88, 38 L. R. A. 512, 60 Am. St. Rep. 393: The conductor negligently put a drunken man off the car. Plaintiff became frightened by the row, and suffered mental and physical pain and anguish, and was put to great expense, but no physical injury or disease followed from it. Held that the action would not lie. Wyman v. Leavitt, 71 Me. 227, 36 Am. Rep. 303, is to the like effect; but the court adds that, "Whether fright of suffi-

cient severity to cause physical disease would support an action, we do not now require."

LIBEL AND SLANDER—WHETHER A FALSE NEWSPAPER OR INDIVIDUAL CRITICISM OF A CANDIDATE FOR OFFICE IS A PRIVILEGED COMMUNICATION.—It is very often the case in the law that while insisting upon some well recognized right of one citizen or class of citizens, we overlook the importance of some correlative right of another citizen or class of citizens. For many years our forefathers fought for the right of free speech and the liberty of the press and against the star-chamber methods of earlier times, under which the independence and usefulness of both were so much abridged. But so great has been the public insistence upon these rights, especially as regards the criticism of candidates for office, that as far as such candidates are concerned, their exercise often comes very near to obscuring, if not disregarding the equal right of the individual citizen, whether a candidate for office or not, to be secure in his reputation and good name among his fellow citizens.

The importance of the observation just made is well illustrated by the recent case of Jarman v. Rea, 70 Pac. Rep. 216, where the Supreme Court of California held that because one is a candidate for office, an elector is not privileged in making in the presence of another elector a statement imputing a crime to him.

California, like many other states, has a statutory provision defining what are privileged communications. The statute of California provides: "A privileged publication is one made in a communication, without malice, to a person interested therein, by one who is also interested therein, or by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motion for the communication innocent, or who is requested by the person interested to give the information." Even without such statutory provision, however, such is the general rule at the common law and therefore in force in every state where the common law obtains. A leading authority states the rule at common law to be: "A communication made in good faith upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, public or private, either legal, moral or social, if made to a person having a corresponding interest or duty, is privileged." Am. & Eng. Ency. Law, p. 403, substantiated by many authorities in England and America therein cited.

The question in the case referred to was whether the criticism of one elector of a candidate for office, if made to another elector, is a privileged communication. If it is, the statement or statements thus made are not actionable merely because false, but express malice must be shown. It is a general rule that when a person is before the public as a candidate for office, much latitude is allowed for publishing, for the information of voters, charges affecting his fitness for the office to which he aspires, and the tendency of courts is to hold the occasion to be such as to render the publication *prima facie* privileged. State v. Burnham, 9 N. H. 14; Miner v. Detroit Co., 49 Mich. 355; Rowand v. De Camp, 96 Pa. St. 493; Sweeney v. Baker, 13 W. Va. 158; Shurtleff v Stevens, 51 Vt. 501; Wilson v. Fitch, 41 Cal. 368 But while this is the general rule the cases are divided in three groups. One class of cases holds that libelous matter published against a candidate for office is not a privileged communication at all. Aldrich v. Printing Co., 9 Minn. 133; Bonner Pub. Co. v. State, 16 Lea (Tenn.), 176, 7 Am. Rep. 214. In the last case cited it was held that neither the public press nor an individual can discuss either the *conduct* or *character* of candidates for office, without incurring liability, for defamatory utterances published, although such publications may be made without malice and upon probable cause. The second group of authorities holds that while a candidate's personal and moral qualifications cannot be falsely impugned without incurring liability, his conduct and qualification in and for the office for which he is running are put in issue by his consenting to become a candidate, and statements made in regard to such matters are *prima facie* privileged. Commonwealth v. Clapp, 4 Mass. 169; Sweeney v. Baker, 13 W. Va. 160; White v. Nichols, 3 How. (U. S.) 266; Jones v. Townsend, 21 Fla. 431; Coffin v. Brown, 94 Md. 190, 50 Atl. Rep. 567; Klinck v. Colby, 46 N. Y. 369. Still a third class of cases hold that if an otherwise libelous article he published and the writer believes it to be true and of importance to, and for the sole purpose of advising electors how to vote, the publication is privileged. Mott v. Dawson, 46 Iowa, 533; State v. Balch, 31 Kan. 465; Bays v. Hunt, 60 Iowa, 251. In the Kansas case a petition was circulated in a certain district falsely attacking the character of a certain candidate for office. The court in directing the acquittal of the defendant, after the jury had convicted him, said: "If the libelous article was circulated only among the voters of Chase County, and only for the purpose of enabling the voters to cast their ballots more intelligently, and the whole thing was done in good faith, we think the article was privileged and the defendants should have been acquitted, although the principal matters contained in the articles were untrue in fact and derogatory to the character of the prosecuting witness."

However, whatever may be the rule as to the extent of freedom with which a candidate for office may be criticised, it seems to be settled by the weight of authority that to falsely impute to him moral delinquency or crime transcend, whatever of privilege there may exist in such a class of communications, and the one who makes the false accusation, or who publishes it, whether innocently or otherwise, is liable both civilly and criminally. Publishing Co. v. Hallam, 59 Fed. Rep. 530; Bronson v. Bruce, 59

Mich. 467, 26 N. W. Rep. 671, 60 Am. Rep. 307; Hamilton v. Eno, 81 N. Y. 116; Rearick v. Wilcox, 81 Ill. 77; King v. Root, 4 Wend. (N. Y.) 113, 21 Am. Dec. 102; Seeley v. Blair, Wright (Ohio) 358; Sweeney v. Baker, 13 W. Va. 158; Smith v. Burrus, 106 Mo. 94, 16 S. W. Rep. 881, 13 L. R. A. 58, 27 Am. St. Rep. 329. In the last case cited, the Supreme Court of Missouri, speaking of the existence of a privilege to criticise candidates for office with impunity, said: "None would be such candidates but abandoned men, who had no respect for their characters. And how intolerable would the government become whose offices were filled by men of such character. The law, as well as the juries, must suppress such licentiousness of the press. There is a conflict of authority on the question whether such an instruction should be given in instances like the present; but, as this case is one of first impression in this state, we are free to adopt that rule which we regard as best comporting with the proper preservation of the rights of individuals, good government, social order, justice, and sound reason. The correct rule, we take it, is that expressed by the Supreme Court of Massachusetts in Com. v. Claps, 4 Mass. 163, 3 Am. Dec. 212, where Chief Justice Parsons, speaking for the court, said: 'When any man shall consent to be a candidate for a public office conferred by the election of the people, he must be considered as putting his character in issue, so far as it may respect his fitness and qualifications for the office; and publications of the truth on this subject, with the honest intention of informing the people, are not a libel, for it would be unreasonable to conclude that the publication of truths, which it is the interest of the people to know, should be an offense against the law. For the same reason the publication of falsehood and calumny against public officers or candidates for public offices is an offense most dangerous to the people, and deserves punishment, because the people may be deceived, and reject the best citizens, to their great injury, and it may be, to the loss of their liberties.' "

THE INITIATIVE AND REFERENDUM UNDER THE UNITED STATES CONSTITUTION.

I have been asked to give expression to my views respecting the title of this article, and more especially, am I asked to do this, with special reference to, and consideration of, the same subject, which has sprung into recent prominence by reason of the adoption of such a system in the states of Oregon and South Dakota, and of the introduction in the Missouri legislature of a joint and concurrent resolution looking to an amendment of the state constitution in regard to legislation and the right of the people, *en masse*, directly to participate therein, or to absolutely control the same. The resolution mentioned is the following:

Be it resolved by the senate and house of representatives concurring therein:

At the general election to be held on the Tuesday next following the first Monday in November, 1904, an amendment to the constitution of the state of Missouri shall be submitted to the qualified voters of the state in the following words:

The people expressly reserve to themselves the right to propose measures, which measures the general assemby shall enact and submit to a vote of the electors of the state, and also the right to require that any laws which the general assembly may have enacted shall be submitted to a vote of the electors of the state before going into effect, except such laws as may be necessary for the immediate preservation of the public peace, health or safety and support of the state government and its existing institutions.

This brief form of joint and concurrent resolutions was, however, greatly expanded when it came into, and from, the hands of the "Committee on Constitutional Amendments," under whose motherly incubation it quickly assumed these greater and more expansive proportions, to-wit:

Be it resolved by the senate and house of representatives concurring therein:

At the general election to be held on the first Tuesday after the first Monday of November, 1904, there shall be submitted to the electors of the state of Missouri, an amendment to section 1, article 4 of the state constitution; so that the said section, when amended, shall read as follows:

Section 1. Paragraph 1. The legislative power of this state is inherent, and shall be vested in the electors of this state, and also shall be vested, subject to acceptance or rejection by the electors of this state, in a senate and house of representatives, to be styled "The General Assembly of the state of Missouri." The legislative power of any municipal division of this state (such as county, city, town, village, township, school district, etc.), on its own municipal matters is inherent and shall be vested in the electors of each municipal division, subject to such laws of a general nature, having uniform operation throughout the state as the electors of the general assembly may enact.

Paragraph 2. A number of the electors of this state, equal to five per cent. of the total number of the votes cast at the last preceding general election for governor, shall have the power to require that any act or part of an act, passed by the general assembly, shall be referred to the electors at the next general or special election, by filing their signed demand with the secretary of state, not more than ninety days after adjournment of the general assembly which passed the act, earlier

than which date no law or part of a law can become operative, except that ordinary appropriations acts for the maintenance of the state government and its public institutions, and all laws for the immediate preservation of the public peace, health and safety, may go into immediate operation, if passed by a two-thirds vote of the members elected respectively to each house and approved by the governor.

Paragraph 3. A number of the electors of this state, equal to seven per cent. of the total number of votes cast at the last preceding general election for governor, shall have the power to propose any law, amendment to or repeal of a law, and require that it be referred to the electors of the state to be voted on at the next general or special election, provided, the election does not occur within ninety days after the filing of the petition with the secretary of state, and such law shall be in effect from and after the date of the official declaration of the result of the vote, if approved by a majority of those voting thereon.

Paragraph 4. A number of electors equal to ten per cent. of the total vote cast at the last preceding general election for governor, shall have the power to propose any amendment to the constitution of the state of Missouri and require that such amendment be referred to the next general election, provided the election does not occur within six months after the filing of the petition with the secretary of state, and such constitutional amendment shall be in effect from and after the date of the official declaration of the result of the vote, if approved by a majority of those voting thereon.

Paragraph 5. All the component parts or sheets of any petition, used to receive the signatures of electors, to invoke either the referendum or the initiative as described in paragraphs 2, 3 and 4, shall have plainly printed thereon the full text of the measure to be referred or proposed, and each signer thereto shall give his postoffice address, and if in a city or town, the street and number of residence shall be included.

One of the signers, a qualified voter, on each paper shall make oath before an officer competent to administer oaths, that the statements therein made are true, and that each signature to said paper appended is the genuine signature of the person whose name purports to thereto subscribed.

Paragraph 6. Any law or part of a law, approved or enacted by the electors as aforesaid, shall not have its force, intent or purpose, impaired or annulled by any ruling, decision or construction of any of the courts of this state; neither shall any such law or part of a law be repealed or altered without a vote of the electors on the proposed repeal or alterations. The veto power of the governor shall not be exercised as to the laws approved or enacted by the electors. This amendment shall not be construed so as to deprive the general assembly or any member thereof, of the right to propose any law or other measure. The enacting clause of every law shall be: "Be it enacted by the people of the state of Missouri, as follows."

Paragraph 7. All provisions of the constitution of this state and all laws thereof, not consistent with this amendment, shall upon its adoption, be forever rescinded and of no effect.

The meaning of the term referendum is thus stated by a lexicographer: "*Referendus—a—um, gerundive of referre, refer.* "In Switzerland, the right of the people to decide on certain laws or measures which have been passed by the legislative body. In one of its two forms, facultative referendum (contingent on certain conditions) or obligatory referendum, it exists in nearly all the cantons. Since 1874 the facultative referendum forms part of the federal constitution if eight cantons or 3,000 voters so demand, a federal measure must be submitted to popular vote."[1] Initiative: "The power of commencing, originating, or setting on foot; the power of taking, or the ability or disposition to take the lead."[2]

Section 1 of Art. 4, of the Missouri constitution (now proposed to be amended), reads in this way: Section 1. "The legislative power, subject to the limitations herein contained, shall be vested in a senate and house of representatives to be styled: "The general assembly of the state of Missouri." Comparing the existing section with the proposed amendment, it will at once be noted what radical, indeed, what *revolutionary* changes in the present constitution are proposed by the latter. By the present constitution the legislative power is vested *exclusively* "in a senate and house of representatives." By the proposed amendment such power is vested exclusively "in the electors of the state," either "to propose any law," etc., to the general assembly and cause the same to be referred to the electors of the state; such law to be in force if approved by a majority of those voting, and from the date of the official declaration of the result of the vote. And the only legislative power (*so called*), vested in the senate and house of representatives, is "*subject to acceptance or rejection by the electors of the state.*"

The only instances where the senate and house of representatives are *permitted* with-

[1] Cent. Dict.
[2] *Ibid.*

out let or hinderance to exercise the ordinary functions pertaining to legislators, are definitely expressed and set forth in this language of the proposed amendment "except that ordinary appropriation acts for the maintenance of the state government and its public institutions, and all laws for the immediate preservation of the public peace, health and safety, may go into immediate operation," if passed by the requisite vote., etc., and approved, etc. And even after a law has been enacted in due form, it is still subject, under the proposed amendment, before it can have any validity, to the acceptance of the electors of the state, if demand therefor be made by a certain number of the voters. So that it will readily be seen what a small *quantum* of legislative power will remain in the general assembly of the state of Missouri or in any state, if such an amendment be adopted.

And the question arises just here, whether the *amendment itself* will be *valid* if adopted? Ordinarily, and generally speaking, it is true that amendments of the organic law of a state are to be treated as valid, but this is not universally true. The amendment if repugnant to the constitution of the United States, or laws made in pursuance thereof, or to any treaty made under the authority of the United States, is void, "anything in the constitution or laws of any state to the contrary notwithstanding."[3]

The federal constitution declares: "The United States shall guarantee to every state in this union a republican form of government."[4] A republican form of government is necessarily a *representative* government *by delegation* instead of a *pure democracy*, where the people directly enact all laws and perform all other functions of government, legislative, executive and judicial without the intervention of agents. Mr. Madison, when speaking of what, and in what, a republic consists, said: "If we resort for a criterion to the different principles on which different forms of government are established, we may define a republic to be, * * * a government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure, for a limited perod, or, during good behavior.[5]" Elsewhere the learned author restates the two salient points of difference between a *democracy* and a *republic*.[6]

Defining a republican form of government, Judge Cooley says: "A government in the republican form; a government by representatives chosen by the people."[7] A statesman, inferior to none in point of accuracy and clearness of logical statement, said: "The constitution and government (of the United States) rest, throughout, on the principle of the concurrent majority; * * * it is, of course, a *republic*, a *constitutional* democracy in contra-distinction to an *absolute* democracy; and * * * the theory which regards it as a government of the *mere numerical majority* rests on a gross and groundless misconception."[8] Representative democracy is thus defined by Bouvier: "A form of government where the powers of the sovereignty are delegated to a body of men elected from time to time, to exercise them for the benefit of the whole nation."[9]

Thus, we see that a republican form of government and a *representative* or *constitutional democracy*, as above defined, are *interchangeable terms, one and the same thing*. Nor are we without direct support for this position by an adjudication by the final arbiter in such matters. Thus, in Minor v. Happersett,[10] it is said: "The guaranty is of a republican form of government. No particular form of government is designated as republican, neither is the exact form to be guaranteed, in any manner especially designated. Here, as in other parts of the instrument, we are compelled to resort elsewhere to ascertain what was intended. The guaranty necessarily casts the duty on the part of the states themselves to provide such a government. All the states had governments when the constitution was adopted. In all, the people participated to some extent through their representatives elected in the manner specially provided. These governments, the constitution did not change. They were accepted precisely as they were, and it is, therefore, to be pre-

[3] Art. VI. U. S. Const.
[4] Art. IV. sec. 4.
[5] Federalist and other Const. Pap. vol. 1 p. 210; Fed. Statm. Series.
[6] *Ib.* 58.
[7] Cooley, Const. 194.
[8] Vol. I., 185, Calhoun's Works.
[9] 1 Bouv. Inst. n. 31.
[10] 21 Wall. 162.

sumed that they were such as it was the duty of the states to provide. Thus, we have unmistakable evidence of what was a government, republican in form, within the meaning of that term as employed in the constitution."

Tested by the foregoing authorities and standard definitions as well as by the direct adjudication just quoted, does the proposed amendment fall under the ban of the federal constitution? If it does, then according to Judge Cooley the federal government would be bound to interfere. He says: "The power of the people to amend or revise their constitution is limited by the constitution of the United States in the following particulars: It must not abolish the republican form of government, since such an act would be revolutionary in its character, and would call for and demand direct intervention on the part of the government of the United States."[11] Elsewhere, the eminent jurist discoursing on the same topic says: "Even in strict accordance with the forms prescribed for amending a state constitution, it would be possible for the people of the states to effect such change, as would deprive it of its republican character. It has been suggested that it would then be the duty of congress to intervene. In any case there could probably be no appeal from the decision of congress."[12] And the courts, both of the states and nation, when such a constitution-breaking amendment or a law bottomed thereon, were to come before them for adjudication would be bound, under the oath required by Article VI. of the federal constitution, to declare such amendment or the law, the outgrowth of such amendment, null and void; — and this, for the reason that an unconstitutional law, whether organic or statutory, is no law at all.[13]

After full consideration of the proposed constitutional amendment, I am unable to reach any other conclusion, but that the amendment cannot withstand the test and the charge that it attempts to substitute for a "republican form of government," something which does not come up to the standard of such a form of government as understood at the time of the adoption of the federal constitution, a contemporary construction, which has never been departed from, but which has received the express sanction of the Supreme Court of the United States, as "unmistakable evidence of what was a government republican in form within the meaning of that term as employed in the constitution."

Nor do I believe that the conclusion just announced is at all affected or in any manner impaired by reason of the fact that the proposed amendment allows the general assembly to retain certain shreds and patches of legislative power, to pass certain perfunctory laws relating to appropriations, etc. A legislative body so shorn of its customary and constitutional functions cannot be longer regarded as the representatives of the people. The legislative power cannot be halved, quartered, nor in any other way subdivided. A representative democracy cannot be crossed with an "*absolute*" democracy, and still the hybrid resultant from such copulative conjunction prove to be, and constitute, "a government republican in form." Clay and iron cannot in such case be welded together, any more than they could in the feet of the image which Daniel saw in his vision.

The task attempted in this case to subject the legislature of the states to outside domination, must, it seems, prove as abortive as though similar measures had been attempted towards the judiciary and the judgments and the decrees of the courts both *nisi* and appellate subjected to acceptance or rejection by a popular vote. The same power, if existent as to the *legislature*, must of necessity exist as to the *judiciary*. Why go through the stupid formality of long litigation in the courts when the whole matter could be settled far more *speedily* and *intelligently* by a popular vote taken on the question, whether Smith murdered Jones, or whether Black unlawfully took possession of White's land. Indeed, it may well be asked, why elect a *legislature at all*, except for the purpose of electing a United States senator, when all the perfunctory duties left to the legislature could so easily be discharged by a couple of competent clerks stationed at the capitol? And if "*economy*" is so much in vogue there, certainly the cutting off of a vast amount of useless expense,

[11] Cooley, Const. 44.

[12] Cooley, Const. 196.

[13] "When a statute is adjudged to be unconstitutional, it is as if it had never been. Rights cannot be built up under it; contracts which depend upon it for their consideration are void; it constitutes a protection to no one who has acted under it, and no one can be punished for having refused obedience to it before the decision was made." Cooley, Const. 222.

if the principle of the proposed amendment be correct, would be a great *desideratum*.

In conclusion, it may be well to advert, for a moment, to a provision of paragraph 6 of the amendment proposed, which declares that "any law or part of a law, approved or enacted by the electors as aforesaid, shall not have its force, intent or purpose, impaired or annulled by any ruling decision or construction of any of the courts of this state." Suppose that a court on examination of such statute should find it to be in conflict with the constitution of the United States, or a law passed in pursuance thereof, or a treaty made under the authority of the United States, shall not such court declare such conflict to exist, and consequently that such statute is *void*? And then as to the "force, intent or purpose" of the statute "approved or enacted by the electors," shall not they be ascertained by the application of the usual rules of constructon or interpretation? What other means have the courts to resort to except those mentioned? When it is remembered, of course, by those who are conversant with precedents how much difficulty courts have had in the past in construeing on interpreting even the most plainly worded statutes, the futility of the requirement mentioned and quoted, becomes at once, apparent. Take, for instance, the statute of frauds of England, a statute of but three short sections (a statute on which our own statutes are substantially bottomed), and yet that statute plainly worded as it is, has cost the British government or its people, many millions of pounds to determine "its force, intent or purpose."

The only exception to a plainly worded statute failing to occasion or cause litigation, is the "statute of descents and distributions" of Virginia, drawn by Thomas Jefferson at one sitting, a statute which cut loose from and repudiated the law of *primogeniture*, and established decents and distributions on a just and rational basis; that statute has given rise to less litigation than any other statute ever penned by mortal man. But, perhaps, the remark may be ventured without fear of successful contradiction, that Thomas Jefferson has not often been *duplicated* even in the legislature of Missouri, or of any other state.

T. A. SHERWOOD.

St. Louis, Mo.

MONOPOLIES — REGULATION OF PRICES BY PLUMBERS' ASSOCIATION.

WALSH v. ASSOCIATION OF MASTER PLUMBERS OF ST. LOUIS, MO.

St. Louis Court of Appeals, December 16, 1902.

Injunction will lie to dissolve an illegal agreement between a plumbers' association and dealers and manufacturers, whereby the latter agree not to sell to others than members of the association, and the former to boycott any dealer found selling to a non-member, and to restrain the enforcement of such agreement against a plumber who, by reason thereof, has been unable to purchase supplies with which to do his work.

STATEMENT OF FACTS: The facts showed that several large plumbing supply houses of the city of St. Louis entered into a written agreement with the members of the Association of Master Plumbers, that the said dealers would not sell to any master plumbers any plumbers' supplies, unless said master plumbers desiring to buy said supplies was a member of the said association. It was further agreed that if any dealer violated this agreement he would be boycotted by the association. As a result of this agreement the plumbing supply houses of the city of St. Louis have ever since refused to sell to plumbers not members of the Master Plumbers' Association, or any other person in the city of St. Louis, plumbing supplies of any description whatsoever. The purpose and intent of this agreement was evidently for the purpose of limiting competition, and restricting trade and raising and controlling the prices of plumbers' supplies in the city of St. Louis. The condition of affairs produced by this conspiracy to maintain prices became intolerable, and suit was brought by a master plumber, not in the association, to test the validity of the agreement, and to enjoin the Master Plumbers' Association from interfering with the plaintiff in his right and effort to purchase plumbers' supplies from any of the dealers in the city. On demurrer to this petition in the trial court plaintiff lost his case.

BLAND, P. J.: In Hunt v. Simonds, 19 Mo. 586, the court said: "It is obviously the right of every citizen to deal or refuse to deal with any other citizen, and no person has ever thought himself entitled to complain in a court of justice of a refusal to deal with him, except in some cases where, by reason of the public character which a party sustains, there rests upon him a legal obligation to deal and contract with others." The same doctrine is announced in Shoe Co. v. Saxey, 131 Mo. 212, 32 S. W. Rep. 1106, 52 Am. St. Rep. 622; State v. Associated Press, 159 Mo. 410, 60 S. W. Rep. 91, 51 L. R. A. 151, 81 Am. St. Rep. 368; Carew v. Rutherford, 106 Mass. 13, 8 Am. St. Rep. 287; Brewster v. Miller (Ky.), 41 S. W. Rep. 301, 38 L. R. A. 505. Cooley in his work on Torts (2d Ed. p. 328), states the principle broadly as follows: "It is part of every man's civil rights that he be left at liberty to refuse business rela-

tions with any person whomsoever, whether the refusal rests upon reason or is the result of whim, caprice, prejudice, or malice." In Walker v. Cronin, 107 Mass. 555, it is said: "Every one has a right to enjoy the fruits and advantages of his own enterprise, industry, skill and credit. He has no right to be protected against competition; but he has a right to be free from malicious and wanton interference, disturbance, or annoyance. If disturbance or loss come as a result of competition, or the exercise of like rights by others, it is *damnum absque injuria*, unless some superior right by contract or otherwise is interfered with." A capitalist has the right to employ his capital, or to hide it away and refuse to use it, so long as he does not become a public charge, and a man without capital may labor or refuse to labor so long as he keeps out of the poorhouse. So, also, have capitalists the right to combine their capital in productive enterprises, and by lawful competition drive the individual producer and the smaller ones out of business. And laborers and artisans have the right to form unions, and by their united effort fight competition by lawful means. Snow v. Wheeler, 113 Mass. 179; Association v. Walsh, 2 Daly, 1; Reg. v. Rowlands (1851), 2 Denison, Crown Cas. 364. And courts will not lay their hands upon either to restrain them, however fierce the competition, so long as their methods are lawful. But, if either steps without the pale of the law, and by fraud, misrepresentation, intimidation, obstruction, or molestation hinders one in his business or his avocation as an artisan or laborer, courts have not hesitated to interfere, and to afford remedial relief, either by awarding compensatory damages in an action at law, or, where the injury is a continuing one, by granting injunctive relief. Lucke v. Clothing Cutters' and Trimmers' Assembly No. 7,507 (Md.), 26 Atl. Rep. 505, 19 L. R. A. 408, 39 Am. St. Rep. 421; Quinn v. Leathem (1901), App. Cas. 495; Toledo v. A. A. & N. M. R. Co. v. Pennsylvania Co. (C. C.), 54 Fed. Rep. 746, 19 L. R. A. 395; Jackson v. Stanfield, 137 Ind. 592, 36 N. E. Rep. 345, 37 N. E. Rep. 14, 23 L. R. A. 588; Olive v. Van Patten, 7 Tex. Civ. App. 630, 25 S. W. Rep. 428; Cœur D'Alene Consol. & Min. Co. v. Miners' Union of Wardner (C. C.), 51 Fed. Rep. 260, 19 L. R. A. 382; Beadel v. Perry, L. R. 3 Eq. 465; Broome v. Telephone Co., 42 N. J. Eq. 141, 7 Atl. Rep. 851; Doremus v. Hennessy, 176 Ill. 608, 52 N. E. Rep. 924, 54 N. E. Rep. 524, 43 L. R. A. 797, 802, 68 Am. St. Rep. 203. In Emack v. Kane (C. C.), 34 Fed. Rep. 46, Blodgett, J., said: "I cannot believe that a man is remediless against persistent and continued attacks upon his business, such as have been perpetrated by these defendants against the complainant, as shown by the proofs in this case. It shocks my sense of justice to say that a court of equity cannot restrain systematic and methodical outrages like this by one man upon another's property rights. If a court of equity cannot restrain an attack like this upon a man's business, then the party is certainly remediless, because an action at law in most cases would do no good, and ruin would be accomplished before an adjudication would be reached. True, it may be said that the injured party has a remedy at law; but that might imply a multiplicity of suits, which equity often interposes to relieve from. But the still more cogent reason seems to be that a court of equity can, by its writ of injunction, restrain a wrongdoer, and thus prevent injuries which could not be fully redressed by a verdict and judgment for damages at law." The petition alleges that the agreement between the Association of Master Plumbers and the respondent corporations is for the purpose of fixing prices and limiting the production of plumbers' supplies. Agreements of this character are prohibited by section 8978, art. 2, ch. 143, Rev. St. 1899, and they are, therefore, unlawful. But it is contended by respondents that, conceding the agreement to be unlawful because within the prohibition of said section, the illegal agreement concerns the public only, and can only be declared illegal in a suit brought for the purpose by the attorney general or the prosecuting attorney of the county, as provided by the next succeeding section (8979). Section 8982 of the same article expressly provides that it is the purpose of the article to provide an additional remedy for the control and restraint of pools, trusts, and conspiracies in restraint of trade. And it is evident that, if the remedy prayed for by appellant existed before the enactment of said article 2, it is not taken away or in any way abridged by section 8979 of the article.

The contract being unlawful, it remains to be seen whether or not the appellant's private rights were obstructed or interfered with as a result of the illegal agreement. The petition alleges that they were; that he was unable to purchase supplies, on account of said agreement, with which to do his work, and was prevented from taking plumbers' contracts for the reason he could not procure the supplies necessary to fill the contracts; that the only reason the respondent corporations have for refusing to sell him supplies is because he is not a member of the Association of Master Plumbers, and that one of the purposes of the illegal agreement is to coerce him to become a member of said association. In Doremus v. Hennessy, 176 Ill. 608, 52 N. E. Rep. 924, 54 N. E. Rep. 524, 43 L. R. A. 797, 802, 68 Am. St. Rep. 203, it was held that members of a trade association, who combined to induce or compel other persons not to deal nor enter into contracts with one who will not join the association or conform his prices with those fixed by the association, will be liable for the injuries caused to him by loss of business resulting from such combination. In Jackson v. Stanfield, *supra*, it was held that: "A combination of retail lumber dealers to destroy the business of brokers and commission dealers, who did not keep a lumber yard with an assorted stock of

lumber, by coercing wholesalers to refuse to make sales to such brokers or lose the business of the members of such combination, is unlawful, and renders a member who procures action by the association to the injury of the brokers liable to the latter for damages." An analogous case is Olive v. Van Patten, *supra*. The allegations of the petition show that the respondents have conspired together to boycott the appellant and other master plumbers of the city of St. Louis who have not joined the Association of Master Plumbers. A boycott is defined to be an illegal conspiracy in restraint of trade. Casey v. Cincinnati Typographical Union (C. C.), 45 Fed. Rep. 135, 12 L. R. A. 193. In State v. Firemen's Fund Ins. Co., 152 Mo. 1, 52 S. W. Rep. 595, 45 L. R. A. 363, a conspiracy is defined to be a combination to accomplish an unlawful end by lawful means, or a lawful end by unlawful means. In Mulcahy v. Reg. (1868), L. R. 3 H. L., at page 317, Willes, J., said: "A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means. * * * The number and the compact give weight and cause danger." In Reg. v. Warburton (1870), L. R. 1 Cr. Cas. 276, Cockburn, C. J., said: "It is not necessary, in order to constitute a conspiracy, that the acts agreed to be done should be acts which, if done, would be criminal. It is enough if the acts agreed to be done, although not criminal, are wrongful; *i. e.*, amount to a civil wrong." An instructive case in this connection is the house of lords case of Quinn v. Leathem (1901), App. Cas. 495, wherein it was unanimously held that: "A combination of two or more, without justification or excuse, to injure a man in his trade by inducing his customers or servants to break their contracts with him, or not to deal with him or continue in his employment, is, if it results in damage to him, actionable." The case is interesting in the review made of the case of Allen v. Flood (1898), App. Cas. 1, construing the case as not deciding that boycotting is lawful.

Applying the doctrine of these cases to the allegations of the petition, there can be no question that the agreement between the respondents is an illegal conspiracy, and that its effect is to inflict a civil wrong upon appellant, and that this wrong is a continuing one, and, according to all the authorities entitles the appellant to injunctive relief so far as a court of equity is authorized to administer it within the bounds of equitable jurisprudence. We think it is competent for the court to declare the agreement complained of as illegal and void, and to restrain the parties to the agreement from keeping its terms or demanding that they be kept, and thus leave the respondent corporations and each of them free to deal or not to deal with appellant, as they may choose. In so far as it appears from the allegations of the petition, the Association of Master Plumbers is not an illegal association. Presumably it was formed for the purpose of mutual protection, and to fight competition in their business within the boundaries of the city of St. Louis. As we have seen, the association may lawfully do this by lawful means and methods to the extent of driving nonmembers out of business. We see nothing, therefore, in the petition that would authorize a court of equity to dissolve the association. The cases of Manufacturing Co. v. Hollis, 54 Minn. 223, 55 N. W. Rep. 1119, 21 L. R. A. 337, 40 Am. St. Rep. 319, Continental Ins. Co. v. Board of Fire Underwriters of the Pacific (C. C.), 67 Fed. Rep. 310, and Steamship Co. v. McGregor, 15 Q. B. Div. 476, and other cases cited and relied on by the respondents, are cases wherein no illegal conspiracy was proven, but where the parties only exercised the right to trade or not to trade with others, and in which there was fierce competition, but no unlawful act, and are therefore not analogous to the case at bar.

The judgment is reversed, and the cause remanded, with directions to the circuit court to set aside the order sustaining the demurrer and to overrule the same, with leave to respondents to answer if they are so advised.

NOTE.—*Combination of Laborers for the Purpose of Controlling Labor or Materials as a Combination in Restraint of Trade.*—The opinion of Goode, J., concurring in the opinion of the court in the principal case offers an excellent summary of the cases in this interesting question. He says: "I have consulted many authorities on the propositions involved in this case, and think they warrant the following conclusions:

1. The combination of the defendants charged in the petition is a conspiracy to create a monopoly to raise prices, and in restraint of trade, and is void at common law. Sufficient acts of malice and violence towards this plaintiff are averred to constitute a cause of action. The case stated differs from Hunt v. Simonds, 19 Mo. 583, both in the purpose of the combination,—there being no intention in that case to control prices or restrain trade,—and in the malicious violence alleged to have been exhibited against this appellant. See U. S. v. Addyston Pipe & Steel Co., 29 C. C. A. 141, 85 Fed. Rep. 271, 46 L. R. A. 122, where the cases are collected; Sinsheimer v. Garment Workers (Sup.), 26 N. Y. Supp. 152; Casey v. Typographical Union (C. C.), 45 Fed. Rep. 135, 12 L. R. A. 193; Steamship Co. v. McGregor, 23 Q. B. Div. 598 [1892], App. Cas. 25,—in which the meaning of malice, when said to create a right of action in such cases, is defined. Craft v. McConoughy, 79 Ill. 346, 22 Am. Rep. 171. While the particular agreement dealt with in Skrainka v. Scharringhausen (St. L.), 8 Mo. App. 522, was held valid, the reasoning of the opinion supports Walsh's Case, 2 Daly, 1, and the same is true of Steamship Co. v. McGregor, *supra*.

2. The combination alleged is a positive offense against our present statutes on the subject of pools and trusts, and is made actionable by them. Rev. St. 1899, § 8978, *et seq.*; State v. Firemen's Fund Ins. Co., 152 Mo. 1, 52 S. W. Rep. 595, 45 L. R. A. 363; U. S. v. Addyston Pipe & Steel Co., *supra*; People v. Sheldon, 139 N. Y. 251, 34 N. E. Rep. 785, 23 L. R. A. 221 36 Am. St. Rep. 690; U. S. v. Jellico Mountain Coal & Coke Co. (C. C.), 46 Fed. Rep. 432, 12 L. R. A. 753.

3. Injunction lies to dissolve the conspiracy and restrain the boycott of and violent acts against the

appellant, whose allegations show he is specially damaged, and that the remedy furnished by the statutes is inadequate, because the parties engaged in the conspiracy are numerous, and the injuries to appellant continuous, so that a multiplicity of suits would be required to redress his grievances. 2 Eddy, Comb'ns, § 1010; Wire Co. v. Murray (C. C.), 80 Fed. Rep. 811; U. S. v. Sweeney (C. C.), 95 Fed. Rep. 434; Butchers' Union Slaughter House & Live Stock Landing Co. v. Cresent City Live Stock Landing & Slaughter House Co., 111 U. S. 746, 4 Sup. Ct. Rep. 652, 28 L. Ed. 585; Casey v. Typographical Union, *supra;* Sinsheimer v. Garment Workers, *supra;* Jackson v. Stanfield, 137 Ind. 592, 36 N. E. Rep. 345, 37 N. E. Rep. 14, 23 L. R. A. 588; Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co. (C. C.), 54 Fed. Rep. 730, 19 L. R. A. 387; U. S. v. Jellico Mountain Coal & Coke Co., *supra;* Emack v. Kane (C. C.), 34 Fed. Rep. 47. The proposition that courts will only act to protect property rights against unlawful interferences like the one charged in the petition, so ably insisted on by respondents' counsel, must be qualified to the extent of regarding a man's right to labor as a property right, or at least as entitled to the same protection property rights are; and so the cases hold, and justly, for power and opportunity to labor is many a man's only capital. U. S. v. Sweeney, *supra;* Wire Co. v. Murray, *supra;* U. S. v. Kane (C. C.), 23 Fed. Rep. 748; State v. Glidden, 55 Conn. 46, 8 Atl. Rep. 890, 3 Am. St. Rep. 23. The rule that, where a statute creates a right and a remedy to enforce it, the remedy provided is exclusive, only obtains to shut out relief in equity on the ordinary grounds of equitable jurisdiction in so far as that remedy is adequate. People's Ry. Co. v. Grand Ave. Ry. Co., 149 Mo. 245, 50 S. W. Rep. 829; Hickman v. City of Kansas, 120 Mo. 110, 25 S. W. Rep. 225, 23 L. R. A. 658, 41 Am. St. Rep. 684. The statutory remedy is inadequate to redress appellant's wrongs for the reasons heretofore stated.

Neither is the attorney general or some prosecuting attorney the only party who can proceed against the respondents. The statutes give relief to private persons specially damaged, showing their policy is to protect not only the public, but individuals, against the injurious effects of unlawful combinations; and a private remedy is useful, because it may be called into play as oppression is felt. As to one person having the right to refuse to deal with another, that may be conceded, and the argument built on the proposition that a court of equity is, therefore, powerless to prevent the wrongs alleged, denied. While any or all dealers in plumbing materials may *sponte sua* refuse to sell to appellant, they cannot combine and conspire to that end as the statute law now is. The unlawful combination may be decreed dissolved, the respondents restrained from conspiring against appellant, and, if he still finds himself oppressed by inability to purchase supplies, and makes a showing to the court that it is on account of a continuance of the conspiracy, a case for investigation would be presented, and, if the fact satisfied the court its order had been disobeyed, punishment could be inflicted."

It is evident from the decision of the court that trade unions whether of employers or employees will not be permitted to continue the high handed methods which have been so common of late years. A case which shows this tendency very clearly is that of Doremus v. Hennessy, 176 Ill. 608, 52 N. E. Rep. 924, 54 N. E. Rep. 524, 43 L. R. A. 797, 802, 68 Am. St. Rep. 203. In this case a certain women in the city of Chicago had by constant effort built up a profitable laundry business. She did not own her own laundry plant but employed certain large operating laundries to do the work for her. The officers of the Chicago Laundrymen's Association, an organization of laundrymen organized to maintain prices requested her to become a member and increase the price charged by her to customers in accordance with the scale of prices fixed by their organization. On her refusal to do so, the organization conspired to destroy her business by causing the large operating concerns who were doing her work to refuse longer to have any dealings with her, as a consequence of which, her business as a laundry agent was entirely broken up. She brought suit against the members of the organization and recovered a judgment against them of six thousand dollars. In affirming the judgment the court said: "No persons, individually or by combination, have the right to directly or indirectly interfere or disturb another in his lawful business or occupation, or to threaten to do so, for the sake of compelling him to do some act which, in his judgment, his own interest does not require. * * * Appellants and those persons who refuse to do appellee's work had each a separate and independent right to unite with the organization known as the Chicago Laundrymen's Association, but that they had no right separately or in the aggregate, with others, to insist that the appellee should do so, or to insist that appellees should make her scale of prices the same as that fixed by the association, and make her refusal to do this a pretext for destroying and breaking up her business. A combination by them to induce others not to deal with appellee or enter into contracts with her or do any further work for her was an actionable wrong." See also, as sustaining the same principle: Lumley v. Gye, 2 El. & Bl. 216; Blake v. Lanyon, 6 T. R. 221; Sykes v. Dixon, 9 Ad. & El. 693; Pilkington v. Scott, 15 Mees. & W. 657; Hartley v. Cummings, 5 C. B. 247; Bowen v. Hall, L. R. 6 Q. B. Div. 333; Carew v. Rutherford, 106 Mass. 1; Walker v. Cronin, 107 Mass. 555; Chipley v. Atkinson, 23 Fla. 206; Delz v. Winfree, 80 Tex. 400; Curran v. Galen, 52 N. Y. S. 479; Van Horn v. Van Horn, 52 N. J. L. 284, 10 L. R. A. 184.

JETSAM AND FLOTSAM.

THE LAST CHANCE DOCTRINE.

"The party who has the last clear opportunity of avoiding the accident notwithstanding the negligence of his opponent is considered solely responsible for it." The last chance doctrine thus expressed was adopted in a recent Louisiana case. Barnhill v. Texas & P. R. R. Co., 33 So. Rep. 63. Though stated so broadly, its importance as a doctrine is confined to those cases where the last opportunity to avoid the damage lies with the defendant; for where the negligence of both parties is concurrent, or where the plaintiff has the last chance, recovery is denied by well-established rules of contributory negligence.

The origin of the doctrine is found in the case of Davies v. Mann, 10 M. & W. 546. The basis there suggested for it is that, though the plaintiff was negligent, his negligence was no part of the legal cause of his damage, since the defendant had the last chance to avoid the accident. The New Hampshire court stated this position clearly when it said that under such circumstances the defendant's negligence was, in law, the sole cause of the injury. See Nashua Iron, etc., Co. v. Worcester, etc., R. R., 62 N. H. 159, 163. In that case, however, the fact appeared that a third party's property had been damaged by the accident, and that he had been allowed recovery

against the plaintiff. This was possible only on the ground that the plaintiff's negligence was a legal cause of the third party's damage. The plaintiff's negligence thus was treated as a legal cause of the third party's damage, though not of his own. Since the facts in the cases were the same and the damage to each was apparently a natural and probable consequence of the plaintiff's negligence, the inconsistency in the court's position is apparent. The last chance doctrine consequently must stand, if at all, as an exception to the general rule which denies recovery to a plaintiff guilty of contributory negligence.

The bar raised by contributory negligence rests on the policy of making the loss lie on a person who has been instrumental in bringing it upon himself. See 3 Harv. L. Rev. 269. *Prima facie* the last chance rule seems to shift the loss to the defendant merely because he happens to be the last wrongdoer. The argument is often made, however, that the negligence of a defendant occurring under the circumstances created by the plaintiff's prior negligence is more serious than that of the plaintiff. But it is hard to see how a higher degree of care could be demanded of the defendant by virtue of the prior negligence unless he had knowledge of it. *Cf.* Thomp. Com. Neg. § 232. If such knowledge were made essential, the statement of the rule would take its strongest form. Even so it is open to two objections. In the first place, it is based on the discredited theory of comparative negligence, which allows recovery to a negligent plaintiff when the defendant's negligence is "gross," and his own but "ordinary" or "slight." See Cicero, etc., Ry. v. Menxer, 160 Ill. 320. And secondly, thus qualified, it would rarely prove of practical value, for if the defendant had the required knowledge, his tort generally would amount to an intentional tort to which the rules of contributory negligence have no application. See Sprague, Contrib. Neg., 7. The last chance rule as a distinct doctrine accordingly seems to deserve no place in the law.—*Harvard Law Review.*

CRIMINAL LIABILITY FOR HOMICIDE CAUSED BY DEFENDANT'S NEGLIGENCE.

In cases of homicide by an omission, rather than by a positive act, the criminal law has not yet definitely settled the nature of the defendant's duty. One way in which a legal duty may originate is illustrated in the recent English case of Rex v. Pitwood, 19 T. L. R. 37. The case is peculiarly interesting, since on the facts it directly overrules Regina v. Smith, 11 Cox C. C. 210. It holds that where, through a gatekeeper's negligent failure to close the gates, a person on the track is killed by a train the gatekeeper is guilty of manslaughter. The court argues that the defendant's criminal liability grew out of the contractual duty existing between himself and the railroad. The decision seems to be sound, and several other cases seem to adopt a similar view of the origin of the legal duty. Regina v. Lowe, 3 C. & K. 123; Regina v. Hughes, 7 Cox C. C. 301.

The legal duty in cases of this kind may arise in at least three ways. The first of these is illustrated by the principal case. Secondly, the duty may be imposed by statute. Regina v. Downes, 13 Cox C. C. 111. See Regina v. Middleship, 5 Cox C. C. 275. Thirdly, the weight of authority seems to hold that whenever a person has undertaken to perform any act, even gratuitously, so that others in reliance thereon have changed their position, a legal duty arises toward them. Regina v. Marriott, 8 C. & P. 425; United States v. Knowles, Fed. Cas. 15, 540; *contra*, Regina v. Shepherd, 9 Cox C. C. 123. The principal case probably comes within this class also. In fact, the element of reliance would seem to be present in most of the cases where the duty is regarded as arising from the contract. This third rule is subject to two extensions. Where one person relying on the defendant has placed another in a position of dependence on him, a duty arises. For example, if in the principal case a father, relying on the defendant, had driven on the crossing with his child, the defendant would be responsible for the child's safety independently of the contract. There seems to be no cases directly covering this point, but it falls within the spirit of the rule. Secondly, where the injured party is incapable of reliance, but his position has been changed by the defendant in pursuance of some undertaking to protect him. This covers undertakings to care for idiots and very young children. The cases are in conflict on this point, but the better view seems to favor the defendant's liability, since he has by his own act changed the injured party's position and assumed responsibility for his safety. Regina v. Nichols, 13 Cox C. C. 75; *contra*, Rex. v. Smith, 2 C. & P. 449.

The only cases of liability for manslaughter from an apparent omission which are not included in one of the classes suggested seem to be those where a man has undertaken to control a dangerous force. He then must not negligently allow it to injure any one. See Wharton, Hom. sec. 87. Such cases are nearly akin to those where there has been some positive act. The person, by taking the dangerous force into his control, has made it his, and is responsible for it.

The adoption, in full, of these rules of legal duty would not greatly extend criminal liability in view of the standards of negligence in criminal law. The criminal law requires a man to act with no greater degree of care than a person of his standard of capacity would consider proper. Further, to render a defendant liable, such reckless negligence must be proved as to show a criminal state of mind. Regina v. Noakes, 4 F. & F. 920. Subject to such limitations, broad standards of responsibility may safely be adopted.—*Harvard Law Review.*

HUMOR OF THE LAW.

Judge Pennypacker was once asked by his brother Harry during a session of court for the loan of $5. Harry walked to the desk and whispered the request in the judge's ear. The latter, looking down over the top of his glasses without the suggestion of a smile, said loud enough to be heard throughout the room.

"Put your application in writing and present it to the court in a proper manner."

Mr. Pennypacker, thinking the judge's insistence upon regularity to be merely regard for the dignity of the court, wrote out the request and handed it to the clerk of the court, who in turn passed it to the bench. The judge read it quietly and seriously and then interrupted the pending trial long enough to say:

"Application for loan of $5 made to this court is received and refused."

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. ABATEMENT AND REVIVAL— Probate of Will. — The county court had jurisdiction to set aside the probate of a will on the petition of an heir of the testator, though the petitioner had previously filed a bill in chancery for the same relief, which bill was still pending.— Wright v. Simpson, Ill., 65 N. E. Rep. 628.

2. ACTION—Equity. — Where it is the law of the case that an action is one in equity, and the evidence shows a right to recover at law, the suit must be dismissed.— Porter v. International Bridge Co., 79 N. Y. Supp. 434.

3. ADMIRALTY— Questions Reviewable.— Objection to awards made for salvage services to the officers and crew of the salving vessel, on the ground that they were not made parties to the libels, cannot be raised for the first time in the appellate court. — The Flottbek, U. S. C. C. of App., Ninth Circuit, 118 Fed. Rep. 954.

4. ADOPTION—Inheritance.—A child, adopted by a testator after executing her will, held entitled to take an heir's share of testator's estate as an after-born child.— Flannigan v. Howard, Ill., 65 N. E. Rep. 782.

5. ADVERSE POSSESSION—License. — Continuation for 20 years of a wall erected under a license does necessarily give a right by adverse possession.—Percival v. Chase, Mass., 65 N. E. Rep. 800.

6. ANIMALS — Stallion. — The making and filing by a former owner of a stallion of the certificate required by Rev. St. ch. 38, § 61, in order to recover compensation for service, does not inure to the benefit of any subsequent owner or keeper. — Davis v. Randall, Me., 53 Atl. Rep. 835.

7. APPEAL AND ERROR — Bill of Exceptions.— Taking the original manuscript of the evidence from the bill of exceptions and putting it into the transcript held not to bring the evidence into the record.— South Chicago City Ry. Co. v. Zerler, Ind., 65 N. E. Rep. 599.

8. APPEAL AND ERROR— Failure to Object.—A failure to urge a specific objection against permitting the jury to take the declaration with them to the jury room held to preclude the raising of such objection on appeal.— West Chicago St. R. Co. v. Buckley, Ill., 65 N. E. Rep. 708.

9. APPEAL AND ERROR — Instructions. — Where the court uses a certain form of expression in an instruction at the request of a party, he is estopped to object to the same expression being used in other instructions.— Slack v. Harris, Ill., 65 N. E. Rep. 669.

10. APPEAL AND ERROR—Matters of Practice.—An appellate court will grant a new trial because of the relaxation of the general rule governing cross-examination, where it appears to have resulted in serious injury to the rights of a party.—O'Connell v. Pennsylvania Co., U. S. C. C. of App., Sixth Circuit, 118 Fed. Rep. 989.

11. APPEAL AND ERROR—Right of Jury Trial.—Where the court of appeals has decided that plaintiff has brought an action in equity on a second trial, such decision is the law of the case. — Porter v. International Bridge Co., 79 N. Y. Supp. 434.

12. APPEAL AND ERROR — Waiver of Forfeiture. — A failure to object on the ground of variance to the introduction of evidence as to a waiver of a forfeiture of a life insurance policy held to preclude a raising of the question on appeal. — Traders' Mut. Life Ins. Co. v. Johnson, Ill., 65 N. E. Rep. 634.

13. ATTORNEY AND CLIENT—Alimony .— Where a husband was directed to pay to his wife's attorney separate amounts for alimony and counsel fees, the attorney was not entitled to use payments of alimony for disbursements.—*In re* Bolles, 79 N. Y. Supp. 530.

14. ATTORNEY AND CLIENT— Natural Demand.—Where judgments are set off against each other, such set-off will not be allowed to defeat an attorney's lien for taxable costs.—Collins v. Campbell, Me., 53 Atl. Rep. 837.

15. BANKRUPTCY— Change of Possession. — Transfers of personalty more than five months before bankruptcy, without change of possession, held conclusively fraudulent, under Laws 1897, ch. 417, § 25. — Skillen v. Endelman, 79 N. Y. Supp. 413.

16. BANKRUPTCY— Discharge. — A discharge in bankruptcy can only be availed of by property pleading it.— Lane v. Halcomb, Mass., 65 N. E. Rep. 794.

17. BANKRUPTCY — Extension of Time of Payment. — Where creditor fails to file lien for monument sold to bankrupt within one year, as required by statute, he has no greater rights in the bankrupt's estate than the unsecured creditors. — Lazzari v. Havens, 79 N. Y. Supp. 395.

18. BANKS AND BANKING—Lease of Land.—A lease by a national bank of real estate for a term of 99 years is not invalid because the aggregate rental it agrees to pay during the term exceeds the indebtedness it is authorized to contract.— Brown v. Schleier, U. S. C. C. of App., Eighth Circuit, 118 Fed. Rep. 981.

19. BENEFICIAL ASSOCIATIONS — Default of Member. —Failure to suspend a member as provided by the constitution of a benevolent order for default held not to entitle his widow to an endowment.—Phillips v. United States Grand Lodge of Independent Order Sons of Benjamin, 79 N. Y. Supp. 540.

20. BILLS AND NOTES—Consideration.—A note executed by two persons as joint makers in renewal of a note on which one of the joint makers had been released is without consideration as to him.—Farmers' & Mechanics' Bank v. Hahn, 79 N. Y. Supp. 524.

21. BILLS AND NOTES — Delivery. — Where a person made a note for an amount owed and left it with the father of his creditor, as directed, and paid the interest thereon, held to constitute a delivery. — Enneking v. Woebkenberg, Minn., 92 N. W. Rep. 982.

22. BILLS AND NOTES — Lost Note.— Though the evidence shows that an unindorsed note was lost after maturity, the court may order indemnity as a condition for judgment, or it may order the case continued from term to term until the note has been barred by limitation.— Matthews v. Matthews, Me., 53 Atl. Rep. 831.

23. BILLS AND NOTES—Set-Off.— Vendee's right to set-off damages by breach of warranty against incumbrances against purchase-money notes held not affected by the fact that the notes were secured by mortgage. — Wolf v. Shelton, Ind., 65 N. E. Rep. 582.

24. CARRIERS—Alighting from Car.—Where a street car comes to a full stop, it is negligence to start the car before a passenger has had reasonable opportunity to get off safely.—Astabula Rapid Transit Co. v. Holmes, Ohio, 65 N. E. Rep. 877.

25. CARRIERS— Limited Ticket. — Where a passenger began a return journey before midnight on the date of expiration of a limited ticket, but was prevented from starting by delay of defendant's trains, he was entitled to recover for his ejection on defendant's refusal to accept the ticket.— Morningstar v. Louisville & N. R. Co., Ala., 33 So. Rep. 156.

26. CARRIERS — Negligence. — A complaint for negligence, whereby a passenger alighting from a car was injured, held sufficient, in the absence of a motion to

make more specific. — South Chicago City Ry. Co. v. Zerler, Ind., 65 N. E. Rep. 599.

27. CARRIERS — Persons on Track.— Whether an intending passenger, injured on a railroad bridge, was a licensee or a trespasser, held for the jury.—Chicago Terminal Transfer R. Co. v. Gruss, Ill., 65 N. E. Rep. 698.

28. CHATTEL MORTGAGES—Partnership. — A mortgage on firm merchandise, executed by the members individually, to secure the note of a member, held void as to the creditors of the partnership. — Enck v. Gerding, Ohio, 65 N. E. Rep. 880.

29. COLLEGES AND UNIVERSITIES—State Endowment Fund.—A purchaser of land sold by the state auditor on foreclosure of a state endowment fund mortgage takes freed from the lien of a junior mortgage.— McElwain-Richards Co. v. Gifford, Ind., 65 N. E. Rep. 576.

30. COMMERCE—Police Power.—A reasonable exercise by a city of its police power in regulating the speed of trains within its limits held not invalid as an interference with interstate commerce. —Chicago & A. Ry. Co. v. City of Carlinville, Ill., 65 N. E. Rep. 730.

31. CONSTITUTIONAL LAW— Master and Servant.—Act April 16, 1900, being an act to limit the hours of laborers, workmen, and mechanics employed on public works, held in violation of Const. art. 1, §§ 1, 19, because it abridges the right of parties to contract.— City of Cleveland v. Clements Bros. Const. Co., Ohio, 65 N. E. Rep. 885.

32. CONTRACTS — Parol Agreement. —A parol agreement that a contract previously agreed upon should stand, although one who was to become a party thereto refused to do so, must be supported by a new and independent consideration. — Arnold v. Scharbauer, U. S. C. C., W. D. Mo., 118 Fed. Rep. 1008.

33. CONTRACTS— Performance. — Where a contract for erecting a passenger elevator called for a 10 horse power motor, and one of that size was furnished, defendant was libel for the price, though a larger one was needed.—Morse, Williams & Co. v. Puffer, Mass., 65 N. E. Rep. 804.

34. CORPORATIONS—Contract Under Seal.—Where a contract under seal for building on corporation's premises was executed by an individual, no recovery can be had thereon against the corporation. — Congress Const. Co. v. Worcester Brewing Co., Mass., 65 N. E. Rep. 792.

35. CORPORATIONS—Individual Contracts.— An officer of a corporation held not entitled to complain that a contract entered into by him individually was void as being against the interests of the corporation; it not complaining.—Pungs v. American Brake-Beam Co., Ill., 65 N. E. Rep. 645.

36. CORPORATIONS — Insolvency. — Prior record of mortgage held not to confer on holders of preferred stock thereby secured preference as against supsequent creditors of insolvent corporation. — Black v. Hobart Trust Co., N. J., 53 Atl. Rep. 826.

37. CORPORATIONS — Insolvency.—Where the secretary of a corporation orally agreed to transfer a claim to a bank as collateral, while the bank was solvent, the fact that at the time it was formally transferred the corporation was insolvent did not render the transfer void as a preference, under Stock Corporation Law, § 48.—*In re* Rogers Const. Co., 79 N. Y. Supp. 444.

38. CORPORATIONS — Judgment.—An action will not lie to enforce a judgment, recovered against a corporation for negligence, against its president personally.—Tilley v. Coykendall, N. Y., 65 N. E. Rep. 574.

39. CORPORATIONS—Mortgage.—Thefact that a corporation's mortgage was authorized by a directors' meeting held outside the state did not invalidate it as to a subsequent judgment creditor. — Schultze v. Van Doren, N. J., 53 Atl. Rep. 815.

40. CRIMINAL LAW—Election Court.—A judge sitting on election day to hear questions arising from breaches of the peace and illegal acts connected with the election sits as a committing magistrate.—*In re* Election Court, Pa., 53 Atl. Rep. 784.

41. CUSTOMS DUTIES — Undervaluation.—The fact that a collector fails to levy an additional duty upon imported goods, to which they are subject under the statute by reason of undervaluation, does not effect the right of the United States to recover the same by suit.—United States v. Nuckolls, U. S. C. C. App., Eighth Circuit, 118 Fed. Rep. 1005.

42. DAMAGES — Personal Injury. — In an action by an employee for injuries, evidence of the wages earned by him at the time was properly admitted, though there was no allegation of special damages in the declaration.— Illinois Steel Co. v. Ryska, Ill., 65 N. E. Rep. 784.

43. DEEDS — Condition Subsequent.—Delay of 15 years of grantor in declaring forfeiture for breach of condition subsequent indeed held not to estop it from insisting thereon.—Trustees of Union College v. City of New York, 65 N. E. Rep. 853.

44. DETINUE — Presumption.—Proof that the articles detained were in defendant's possession three days before an action of detinue raised the presumption that they were in her possession at the date of the suit.— Downs v. Bailey, Ala., 33 So. Rep. 151.

45. DISCOVERY — Action for Fraud. — In an action for fraud, plaintiff is not entitled to an examination of defendants to obtain "precise information," as he could allege it on information and belief. — Butler v. Duke, 79 N. Y. Supp. 419.

46. DISCOVERY —Examination of Defendants. — Fiduciary relation between stockholder and director does not require him to furnish information sought by stockholder as a basis of suit against director.—Elmes v. Duke, 79 N. Y. Supp. 425.

47. DIVORCE—Alimony.—The court has jurisdiction, in divorce, to determine whether land in the name of a third party belonged to the husband, and to award such husband's interest to the wife as alimony.— De Witt v. De Witt, Ill., 65 N. E. Rep. 677.

48. DOMICILE — Change of — Merely arranging to make one's home in another place does not change the domicile. — Inhabitants of Palmer v. Inhabitants of Hampden, Mass., 65 N. E. Rep. 817.

49. DOWER — Husband's Equitable Interest in Land.— Wife held not to have any right of dower in land which her husband paid for, but title to which he took in the name of a third party.—Nichols v. Park, 79 N. Y. Supp. 547.

50. ELECTIONS—Ballot.—The fact that crosses opposite the names of candidates on an official ballot are not reproductions of the letter "X" will not invalidate them, though the statute parenthetically indicates that style of cross.—Coulehan v. White, Md., 53 Atl. Rep. 786.

51. ELECTIONS — Recount. — Where a candidate for office causes a recount of the ballots to be had, the opposing candidate does not waive his right to object that the proceeding is illegal by being present at such recount.—Fritz v. Crean, Mass., 65 N. E. Rep. 832.

52. ELECTIONS — Void Ballot. — The fact that a cross-mark has been made after the name of a candidate on an official ballot and then erased invalidates the ballot.— Coulehan v. White, Md., 53 Atl. Rep. 786.

53. EMINENT DOMAIN—Change of Grade.— An owner of land abutting on street held entitled to recover the damages sustained by reason of another part of the street being closed while a railroad company changed its grade. — Putnam v. Boston & P. R. Corp., Mass., 65 N. E. Rep. 790.

54. EMINENT DOMAIN — Land For Street. — Where an application is filed for condemnation of land for a street, the council of the city cannot, by an ordinance passed, change the terms of the application.—Grant v. Village Hyde Park, Ohio, 65 N. E. Rep. 891.

55. EMINENT DOMAIN — Proceedings to Condemn Land.—In a proceeding to condemn land, an instruction that petitioner did not thereby acquire the fee was properly given. — Sexton v. Union Stockyard & Transit Co., Ill., 65 N. E. Rep. 638.

56. ESCROWS — Deed to Land.—The title to land is not affected by a deed executed and placed in escrow, to be delivered only on conditions which are not complied with.—Fitch v. Miller, Ill., 65 N. E. Rep. 650.

57. EVIDENCE — Impeachment of Buyer's Title. — Declarations of a seller after the sale are not admissible to impeach the buyer's title.—Moravec v. Grell, 79 N. Y., Supp. 538.

58. EVIDENCE — Letter Press Copies. — Admission of letterpress copies of letters as secondary evidence held not objectionable for want of a sufficient foundation laid.—Union Surety & Guaranty Co. v. Tenney, Ill., 65 N. E. Rep. 688.

59. EVIDENCE—Life Insurance.—A forfeiture, if any, of a life insurance certificate for an alleged breach of warranty held, in the absence of express provisions to the contrary, not to be self-executing.—Traders' Mut. Life Ins. Co. v. Johnson, Ill., 65 N. E. Rep. 684.

60. EVIDENCE — Negligence. — Conversation with defendant's foreman an hour after an accident caused by the explosion of a machine held inadmissible to show the condition of the machine. — Leonard v. Mallory, Conn., 53 Atl. Rep. 778.

61. EVIDENCE—Negligence.—In an action for injury to a person operating an elevator from negligence of the engineer in making certain changes in the machinery, held not error to admit expert testimony on such question.—Slack v. Harris, Ill., 65 N. E. Rep. 669.

62. EXECUTION — Foreign Corporations. — Where a foreign corporation has been dissolved in its own state, supplementary proceedings cannot be taken on a judgment recovered against it. — *In re* Stewart, 79 N. Y. Supp. 525.

63. EXECUTORS AND ADMINISTRATORS — Legatee for Life.—A legatee for life held to hold an express trust for the benefit of the remainderman, within section 70 of the act in regard to administration of estates, and therefore the probate court had jurisdiction of the claim.—Deiterman v. Ruppel, Ill., 65 N. E. Rep. 707.

64. EXECUTORS AND ADMINISTRATORS—Notice to Unknown Heir. — An unknown brother of an intestate, not cited or appearing in judicial settlement of an estate, may institute proceedings for new accounting on notice.—*In re* Killan's Estate, N. Y., 65 N. E. Rep. 561.

65. EXECUTORS AND ADMINISTRATORS—Wife's Allowance.—A demand for her statutory allowance, made by a widow on her husband's administrator, inures to the benefit of her assignee.—Brown v. Bernhamer, Ind., 65 N. E. Rep. 580.

66. EXPLOSIVES — Compressed Gas. — Use of carbonic acid gas in the manufacture of soda water in a tenement house held not a misdemeanor under Pen. Code, § 389.—People v. Lichtman, N. Y., 65 N. E. Rep. 854.

67. FIRE INSURANCE — Gasoline Clause.—Notice to a soliciting insurance agent, subsequent to the issuance of the policy, that gasoline was kept in violation thereof, held not notice to the insurer.—Cassimus v. Scottish Union & N. Ins. Co., Ala., 33 So. Rep. 163.

68. FRAUD — Pleading. — In an action for deceit, a conspiracy need not be alleged in order to be proved.—Butler v. Duke, 79 N. Y. Supp. 419.

69. FRAUDS, STATUTE OF — Sufficiency of Memorandum.—Letters which do not show that the parties ever agreed on the terms of a contract of sale are not a sufficient memorandum to take the contract out of the statute of frauds.—Leatherbee v. Bernier, Mass., 65 N. E. Rep. 842.

70. FRAUDULENT CONVEYANCES—In a suit to set aside a fraudulent conveyance, the existence of a debt for which the property transferred would have been liable must be shown. — Deposit Bank of Frankfort v. Caffee, Ala., 33 So. Rep. 152.

71. GOOD WILL—Trade Name.—Defendant, selling her business and good will without agreement not to resume trade or use the trade-name, held entitled to use the name on resuming business.—Ranft v. Reimers, Ill., 65 N. E. Rep. 720.

72. GUARANTY — Release.—Release of guaranty by extension of credit must be pleaded.—National Radiator Co. v. Hull, 79 N. Y. Supp. 519.

73. HIGHWAYS — Trespassers. — A child playing in the street held not a trespasser, so far as concerns a traveler running over her. — O'Brien v. Hudner, Mass., 65 N. E. Rep. 788.

74. HUSBAND AND WIFE—Accounting.—In an action for an accounting against a husband, as his wife's agent, he was not entitled to credit for payments to his wife's bank account which was used solely for family expenses.—Young v. Valentine, 79 N. Y. Supp. 536.

75. HUSBAND AND WIFE — Notes.—A married woman's contract to pay the board of an adult sister and her child is not within the married woman's act and is void.—June v. Labadie, Mich., 92 N. W. Rep. 937.

76. HUSBAND AND WIFE — Tenants by Entirety. — The right of a wife as tenant by the entirety cannot be affected by a statute, passed subsequently to the conveyance to her and her husband, reducing such estates to tenancies in common.—Pease v. Inhabitants of Whitman, Mass., 65 N. E. Rep. 795.

77. INDICTMENT AND INFORMATION — Intoxicating Liquors.—An indictment charging that defendant did "unlawfully sell, give away, or otherwise dispose of" intoxicating liquors held to charge that each of such acts was unlawful.—Sims v. State, Ala., 33 So. Rep. 162.

78. INJUNCTION — Pendente Lite. — Right to injunction *pendente lite* held to depend on the complaint, the supporting affidavits, and the answering affidavits.—Le Roy v. Chesebrough, 79 N. Y. Supp. 442.

79. INTOXICATING LIQUORS — Recovery of Penalty.—In an action to recover penalty for violation of the liquor tax law, statutory exceptions as to sale of liquors in prohibited hours need not be negatived. — Cullinan v. Criterion Club, 79 N. Y. Supp. 482.

80. JUDGES — Impeachment.—A probate judge will not be impeached for taking fees to which he was not entitled, where it was not shown that he received them corruptly in any instance. — State v. Lovejoy, Ala., 33 So. Rep. 156.

81. JUDGMENT — Common Law. — Equity may enjoin enforcement of a common-law judgment. — Brooks v. Twitchell, Mass., 65 N. E. Rep. 843.

82. JUDGMENT — Mutual Demand.—Under the common law, independently of statute, opposite demands arising upon judgments may on motion be set off against each other whenever such set-off is equitable. — Collins v. Campbell, Me., 53 Atl. Rep. 887.

83. JUDGMENT — Res Judicata. — A judgment on the merits for defendant in an action against a lessor railroad company for negligence of its lessee held conclusive against the same plaintiff in a subsequent action against the lessee.—Anderson v. West Chicago St. R. Co., Ill., 65 N. E. Rep. 717.

84. JUDGMENT — Res Judicata.—In the absence of proof that an issue was actually determined in arriving at a former judgment, it is conclusive by way of estoppel only as to facts necessarily involved. — Waterhouse v. Levine, Mass., 65 N. E. Rep. 872.

85. LANDLORD AND TENANT — Animals Feræ Naturæ.—Where fish are in any inclosed place which is private property, from which they may be taken by the owner of the inclosure, the taking of them therefrom with felonious intent is larceny. — State v. Shaw, Ohio, 65 N. E. Rep. 875.

86. LANDLORD AND TENANT — Modification of Lease.—Where a tenant holds over at the expiration of a written lease, and his landlord notifies him that if he again holds over the rent will be increased, the terms of the original lease will be modified to conform to such notice.—Moore v. Harter, Ohio, 65 N. E. Rep. 883.

87. LIBEL AND SLANDER — Privilege. — A publication which is a fair answer to a published attack is privileged. —Shepard v. Baer, Md., 53 Atl. Rep. 790.

88. LIFE INSURANCE — Forfeiture.—A forfeiture, if any, of a life insurance certificate for an alleged breach of warranty held, in the absence of express provisions to the contrary, not to be self-executing. — Traders' Mut. Life Ins. Co. v. Johnson, Ill., 65 N. E. Rep. 634.

89. LIFE INSURANCE —General Agent.—There is no inference that a general agent of a life insurance company for one state, who has permission from the company to solicit insurance in another state, has in such latter state any authority greater than that usually possessed by insurance agents. — Baldwin v. Connecticut Mut. Life Ins. Co., Mass., 65 N. E. Rep. 837.

90. LIFE INSURANCE — Payment of Premium. — Where time of payment of the premiums on a life insurance policy was extended, the policy did not lapse, and the insured could not be required to sign an application for revival reciting that he was in good health. — Ætna Life Ins. Co. v. Sanford, Ill., 65 N. E. Rep. 661.

91. LIFE INSURANCE — Suicide. — Where an action on a life policy is defended on the ground of insured's suicide, the burden of proof is on the plaintiff to show insured's unsoundness of mind. — Dickerson v. Northwestern Mut. Life Ins. Co., Ill., 65 N. E. Rep. 694.

92. LIFE INSURANCE — Vested Interest.— A policy of life insurance when issued creates a vested interest in the beneficiary therein. — Laughlin v. Norcross, Me., 53 Atl. Rep. 834.

93. MALICIOUS PROSECUTION — Probable Cause. — The mere fact that plaintiffs in the alleged malicious actions took voluntary nonsuit held not sufficient to show a lack of probable cause. — Cohn v. Saidel, N. H., 53 Atl. Rep. 809.

94. MASTER AND SERVANT — Assumption of Risk. — Where an employee of a quarry company was put to work scabbling stone on cars standing on a side track on a steep grade, he did not assume the risk of his employer leaving such cars unblocked.—Chicago, I. & L. Ry. Co. v. Martin, Ind., 65 N. E. Rep. 591

95. MASTER AND SERVANT — Assumption of Risk. — Where a servant is ordered by his master to perform a dangerous work, and is injured thereby, the master is liable, unless the danger is so imminent that no man of ordinary prudence would incur it. — Slack v. Harris, Ill., 65 N. E. Rep. 669.

96. MASTER AND SERVANT — Contract of Employment.— Where a servant receives injuries which render him entirely incapable for performing the services required of him by his contract, both parties to the contract are absolved from liability to continue performance. — O'Connor v. Briggs, Mass., 65 N. E. Rep. 896.

97. MASTER AND SERVANT — Duty to Warn. — An employer held not required to warn a girl 19 years old, of apparent average intelligence, of the danger of getting her hand caught in a mangler. — Gaudet v. Stansfield, Mass., 65 N. E. Rep. 850.

98. MASTER AND SERVANT — Fellow Servants. — Men in charge of a derrick and a mason's helper in putting up a wall on a building held fellow servants. — McQueeney v. Norcross, Conn., 53 Atl. Rep. 780.

99. MASTER AND SERVANT — Injury to Employee. — Where defendant employed a third party to manufacture furniture for it, furnishing the machinery, and plaintiff was injured by neglect to notify him of the dangerous character of the machine, the defense that plaintiff was an employee of an independent contractor will not avail defendant. — Jacobs v. Fuller & Hutsinpiller Co., Ohio, 65 N. E. Rep. 617.

100. MASTER AND SERVANT — Negligence.—Assumption of risk does not apply where there is negligence on the part of the master in furnishing suitable appliances.— Boucher v. Robeson Mills, Mass., 65 N. E. Rep. 819

101. MASTER AND SERVANT — Negligence. — Servant employed on a railroad held still a servant, while not actually working, in order to obtain a drink of water.— Jarvis v. Hitch, Ind., 65 N. E. Rep. 608.

102. MASTER AND SERVANT — Safe Place to Work. — Owner of uncompleted building, arranging temporary flooring for raising rafters, held liable as if furnishing completed staging for workmen. — Gurney v. Le Baron, Mass., 65 N. E. Rep. 789.

103. MASTER AND SERVANT — Street Railways.—The act of street car conductor not on duty in ringing a bell as a signal to start held an unauthorized assumption of authority, so that the railroad company would not be responsible for any accident caused thereby. — Lima Ry. Co. v. Little, Ohio, 65 N. E. Rep. 861.

104. MECHANICS' LIEN—Performance of Contract.—The fact that a main contractor misconstrued in part a contract with a subcontractor held not to justify the subcontractor in failing to perform other work.—MacKnight Flintic Stone Co. v. City of New York, 79 N. Y. Supp. 521.

105. MINES AND MINERALS—Contract for Development —The obtaining of a government license to do development work in a mine in Nova Scotia held a condition precedent to the applicant's right of action for breach of defendant's contract to do such work on the land.— Jones v. Holden, Mass., 65 N. E. Rep. 808.

106. MONEY PAID. — Recovery from Town. — Fire precinct voluntarily paying bill for which town was liable held not entitled to recover therefor against the town under a count for money paid at its request. — Contoocook Fire Precinct v. Town of Hopkinton, N. H., 53 Atl. Rep. 797.

107. MORTGAGES — Balance After Foreclosure. — The makers of a note and mortgage, in action against them for balance after foreclosure sale, not having been the owners of the equity at the time of sale, held entitled to show that the sale was not conducted as it should have been.—Boutelle v. Carpenter, Mass., 65 N. E. Rep. 799.

108. MORTGAGES — Limitations. — Where the right to foreclose a mortgage is barred by limitations, the right to redeem is also barred; such rights being reciprocal.— Fitch v. Miller, Ill., 65 N. E. Rep. 650.

109. MUNICIPAL CORPORATIONS — Lighting Contract.— Under Comp. Laws, § 2908, the acceptance by a village of electric light service after the year contracted for held not to have created a new contract for another year.— Howell Electric Light & Power Co. v. Village of Howell, Mich., 92 N. W. Rep. 940.

110. MUNICIPAL CORPORATIONS—Obstructions in Street. —A gravel heater, left for several days in a street while it was not in use, held to constitute a defect, rendering the city liable for injuries sustained thereby. — Griffin v. City of Boston, Mass., 65 N. E. Rep. 811.

111. MUNICIPAL CORPORATIONS — Restraint of Trade.— A city ordinance establishing public markets, and requiring persons vending meats elsewhere to take out a license, is not void, as in restraint of trade.—City of Buffalo v. Hill, 79 N. Y Supp. 449.

112. MUNICIPAL CORPORATIONS — Right of Appeal. — Where a leasehold estate was excepted from a judgment confirming a special assessment, the lessee had no sufficient interest in the judgment to entitle him to appeal therefrom. — Weise v. City of Chicago, Ill., 65 N. E. Rep. 648.

113. MUNICIPAL CORPORATIONS — Streets. — While the legislature usually delegates to local authorities the regulation and control of the public rights in the streets, it may, at any time, resume such authority and exercise it as it deems best. — New England Telephone & Telegraph Co. v. Boston Terminal Co., Mass., 65 N. E. Rep. 885.

114. MUNICIPAL CORPORATIONS—Vacating Judgment.— An order vacating a judgment confirming a special assessment, entered on motion of the city and without the consent of the taxpayers affected, held invalid. — McChesney v. People, Ill., 65 N. E. Rep. 626.

115. MUNICIPAL CORPORATIONS — Village Merged in City. — Action held maintainable on contract made by trustees of village thereafter merged in city of New York by the Greater New York charter. — Schwan v. City of New York, N. Y., 65 N. E. Rep. 774.

116. NEGLIGENCE — Children in Street.—A mother, who let her girl go into the yard to play, held not guilty of

contributory negligence; the girl having gone into the street and been hit by a team.—O'Brien v. Hudner, Mass., 65 N. E. Rep. 788.

117. PARENT AND CHILD — Mandatory Injunction. — A bill by the father against the mother, they living in a state of separation, asking a mandatory injunction requiring the mother to permit him to have access to the child, does not properly invoke the jurisdiction of the chancellor.—Rossell v. Rossell, N. J., 53 Atl. Rep. 821.

118. PARTNERSHIP — Evidence. — Evidence in an action to determine title to and cancel trust deeds on certain property, claimed by defendant to have been purchased with partnership funds, examined, and held insufficient to establish the fact of a partnership. — Van Winkle v. Van Winkle, Ill., 65 N. E. Rep. 633.

119. PARTNERSHIP — Rights of Parties. — Where the members of a firm individually execute a mortgage on the stock to secure a note of a member, on the death of one member, such stock held an asset of the partnership rightfully in the possession of the surviving partner as trustee for the creditors of the firm. — Enck v. Gerding, Ohio, 65 N. E. Rep. 880.

120. PHYSICIANS AND SURGEONS — Degree of Care. — It is the duty of a physician to exercise due skill and care, not only in an operation which he decides to be necessary, but to render such continued care as the necessity of the case requires. — Gillette v. Tucker, Ohio, 65 N. E. Rep. 865.

121. POST OFFICE — Police. — A reasonable exercise by a city of its police power in regulating the speed of trains within its limits held not invalid as an interference with United States mail.—Chicago & A. Ry. Co. v. City of Carlinville, Ill., 65 N. E. Rep. 730

122. PRINCIPAL AND AGENT—Evidence of Agency.—An alleged principal may by permission, recognition, or acquiescence create a reasonable inference that another is his agent. — Smith v. Delaware & A. Telegraph & Telephone Co., N. J., 53 Atl. Rep. 818

123. RAILROADS — Speed of Trains.—An ordinance regulating the speed of trains within the city limits is presumptively a reasonable exercise of such authority.—Chicago & A. Ry. Co. v. City of Carlinville, Ill., 65 N. E. Rep. 730.

124. RECEIVERS — Intervention.—Application for intervention in suit against receiver denied; applicants not showing themselves necessary parties to determination of the cause, nor having interest in subject matter.—City of Ironwood v. Coffin, 79 N. Y. Supp. 502.

125. REFERENCE—Accounting.—A referee appointed to determine an entire cause of action held authorized to proceed with an accounting without an interlocutory judgment on a trial of the issues.—Young v. Valentine, 79 N. Y. Supp. 536.

126. SALES—Damages.—A buyer, when sued for price of goods delivered, held not entitled to recoup damages.—W. H. Purcell Co. v. Sage, Ill., 65 N. E. Rep. 723.

127. SALVAGE — Services Entitled to Compensation.—A tugboat company held not estopped to claim compensation for salvage services because of a contract with the owners of the salved vessel to render general towage services. — The Flottbek, U. S. C. C. of App., Ninth Circuit, 118 Fed. Rep. 954.

128. SEAMEN — Injury in Service.—A ship held liable in damages to a seaman for the failure of the master to put into port to secure surgical treatment for a broken leg, by reason of which amputation became necessary.—The Iroquois, U. S. C. C. of App., Ninth Circuit, 118 Fed. Rep. 1008.

129. SET-OFF AND COUNTERCLAIM—Debt Due Firm.—A member of a firm, when sued for his individual debt, may set off a claim due the firm if he has the consent of his copartners and the rights of third parties are not prejudicial.—Collins v. Campbell, Me., 53 Atl. Rep. 837.

130. SPECIFIC PERFORMANCE — Adequate Remedy at Law. — Defense of adequate remedy at law to an action for specific performamce must be pleaded. — Le Vie v. Fenlon, 79 N. Y. Supp. 496.

131. SPECIFC PERFORMANCE—Oral Contract.— Specific performance of oral contract to provide for wife by will denied, for insufficiency of the evidence.—Conlon v. Mission of Immaculate Virgin for Protection of Homeless and Destitute Children, 79 N. Y. Supp. 406.

132 STREET RAILROADS — Negligence.—In an action against a street railway company for negligent death, the burden of proof was upon plaintiff administrator to show that deceased was in the exercise of due diligence.—Cox v. South Shore & B. St. Ry. Co., Mass., 65 N. E. Rep. 823.

133. TAXATION—Credits.—Credits are taxable though secured by liens on real estate. — City of Marquette v. Michigan Iron & Land Co., Mich., 92 N. W. Rep. 934.

134. TAXATION— Deductions.— Disbursement by a personal representative in protecting the estate by litigation should be deducted in fixing the trans'er tax.—*In re* Thomas' Estate, 79 N. Y. Supp. 571.

135. TAXATION — Recovery of Payment Under Unconstitutional Statute. — That a statute under which taxes were paid was subsequently adjudged unconstitutional held not to authorize recovery of the amount so paid.—Yates v. Royal Ins. Co., Ill., 65 N. E. Rep. 726.

136. TAXATION—Redemption of Tax Sale. — In suit to redeem certain lands from a tax sale, pursuant to an alleged agreement between the owner, complainant, and defendant, evidence held insufficient to show the agreement.—Converse v. Brown, Ill., 65 N. E. Rep. 644.

137. TOWNS—Liability for Cost of Sewers.—Acceptance of sewer by town held to make it liable for reasonable value of labor and material put into it, though it had not originally authorized it to be built.—Contoocook Fire Precinct v. Town of Hopkinton, N. H., 53 Atl. Rep. 797.

138. TRADE-MARKS AND TRADE-NAMES— Description.—The word "standard," as applied to scales, is descriptive, and cannot be appropriated as an exclusive trademark to designate a scale of a particular make, either alone or in connection with the word "computing."—Computing Scale Co. v. Standard Computing Scale Co., U. S. C. C. of App., Sixth Circuit, 118 Fed. Rep. 965.

139. TRESPASS—Possession.— One receiving possession from a grantor of land outside the deed, title to which was acquired by adverse possession, held to be in as a *disseisor*.—Percival v. Chase, Mass., 65 N. E. Rep. 800.

140. TRIAL—Instructions. — That requests for rulings are not given in terms cannot be complained of, the court having instructed in effect as requested.—Percival v. Chase, Mass., 65 N. E. Rep. 800.

141. TRIAL — Marine Insurance. — In an action on a marine policy, the reception of evidence as to an unpleaded breach of warranty held waived, where no objection was made at the time.— Ryan v. Providence-Washington Ins. Co., 79 N. Y. Supp. 460.

142. TRIAL — Withdrawal of Count. — The taking of a declaration to the jury room after one count thereof had been withdrawn in the jury's presence held not prejudicial.—West Chicago St. R. Co. v. Buckley, Ill., 65 N. E. Rep. 708.

143. TRUSTS— Husband and Wife. — Where a husband pays the price of realty, and the title is taken in the name of the wife, it is presumed a gift. — Johnston v. Johnston, Md., 53 Atl. Rep. 792.

144. WILLS—Life Insurance.—An interest as beneficiary in a life insurance policy will pass by a devise of all the estate of the testatrix, though the policy was not in existence at the date of the will.— Laughlin v. Norcross, Me., 53 Atl. Rep. 834.

145. WILLS—Setting Aside Probate.—A petitioner, having no notice or knowledge of the proceedings to probate a will, who files a petition to set aside the probate within a year of the date of the probate, is not guilty of laches.—Wright v. Simpson, Ill., 65 N. E. Rep. 628.

146. WILLS—Testamentary Capacity.—Ability to transact ordinary business is a more stringent test of testamentary capacity than the law requires. — Waugh v. Moan, Ill., 65 N. E. Rep. 713.